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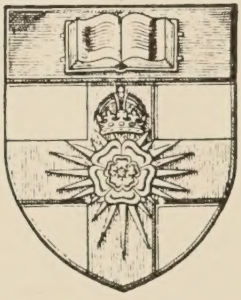

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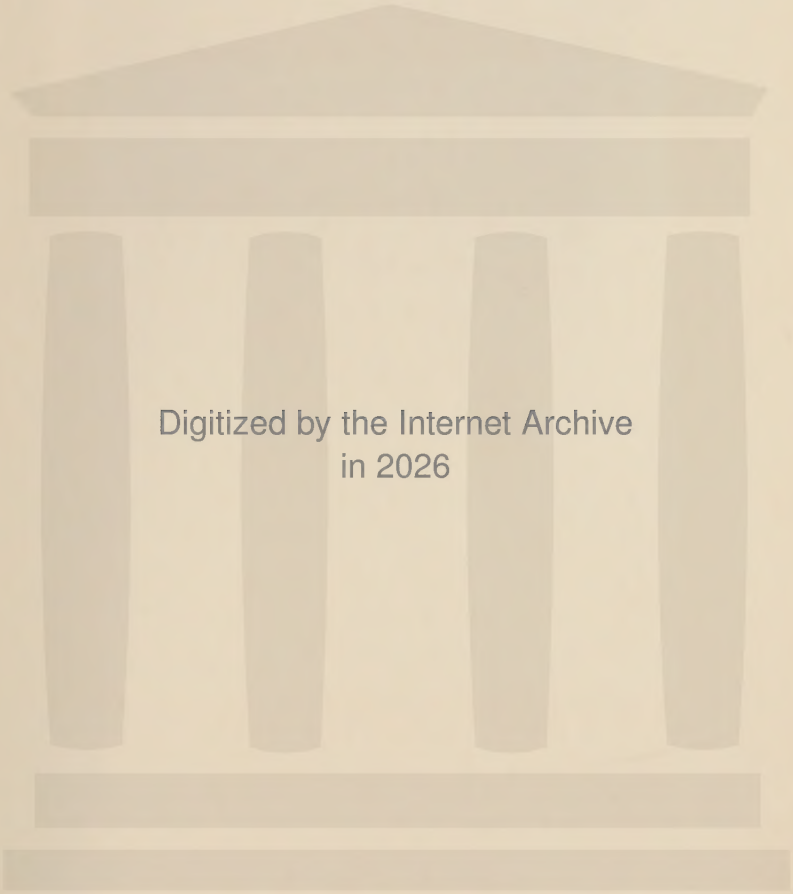
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1912
June 21.

In re MILLER.

Ex parte FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED.

Bankruptcy—Practice—Bankruptcy Notice—Judgment in County Court—No Order for Payment by Instalments—Payment into Court of Part of Debt—Bankruptcy Notice for full Amount—Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*County Court Rules*, 1903 *and* 1904, *Order XXIII., r.* 13; *Order XXV., rr.* 8, 23A, 23B; *Appendix H, Form* 163.

Certain creditors recovered a judgment against a debtor in the county court and it was ordered that the full amount of the judgment debt should be paid on a day specified. Before the day named in the judgment for payment of the debt the debtor paid into Court a sum in part satisfaction thereof. The judgment creditors repudiated this payment and issued a bankruptcy notice requiring the debtor to pay the judgment debt in full without making any allowance for the payment into Court:—

Held, that after the payment into Court execution could not issue for

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MILLER. *In re.* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED, *Ex parte.*

the full amount of the judgment, but only for the balance after giving credit for the amount paid into Court, and consequently that the bankruptcy notice was invalid.

In re Child [1892] 2 Q. B. 77, followed.

Decision of a Divisional Court [1912] 2 K. B. 451, affirmed.

Whether, where a creditor has recovered judgment against a debtor in the county court, it is competent, in the absence of consent to payment by instalments, for the debtor to pay into Court and for the registrar to receive a sum less than the full amount of the judgment debt, quære.

APPEAL from the decision of a Divisional Court (Phillimore and Bray JJ.). (1)

On October 12, 1911, the Furniture and Fine Arts Depositories, Limited, recovered a judgment against the debtor for 57*l.* 5*s.* 6*d.* in the Clerkenwell County Court, and it was ordered that the sum should be paid on November 7. On November 6 the debtor paid into the Clerkenwell County Court the sum of 10*l.* On receiving notice of this payment the judgment creditors protested that it was invalid and that the registrar of the county court had no power to receive it. They subsequently issued in the Brentford County Court, upon a certificate of judgment from the Clerkenwell County Court, a bankruptcy notice for the full amount of the judgment debt, namely, 57*l.* 5*s.* 6*d.* On the application of the debtor the registrar set aside the notice on the ground that it was irregular as having been issued for an amount larger than the sum for which execution could have issued.

On appeal the Divisional Court upheld the decision of the registrar.

The judgment creditors appealed.

Coumbe, for the appellants. The payment into Court was improperly made. The registrar of the county court had no right to receive it, and the appellants were not bound to accept it in the absence of any consent to payment by instalments: s. 105 of the County Courts Act, 1888. This is an attempt to evade the bankruptcy law: *In re Gentry*. (2) There was no order for payment by instalments, the registrar was therefore acting per incuriam in receiving the 10*l.*, and the appellants are not bound to accept it. The payment is in fact a nullity. The full amount

(1) [1912] 2 K. B. 451. (2) [1910] 1 K. B. 825.

of the judgment therefore remains due and unpaid, and the bankruptcy notice was properly issued for the full amount of the debt. The Divisional Court have held on the authority of *In re Chadd* (1) that a bankruptcy notice can only issue for the amount for which execution could issue. But it is submitted that the county court ought to issue execution for 57*l.* 5*s.* 6*d.* For the purposes of execution the registrar of the county court is the creditor's agent, and here the appellants have not accepted and are not bound to accept the 10*l.* and are entitled to call upon the registrar to issue execution for the full amount of the judgment. That being so the bankruptcy notice is good. [He also referred to Order xxv., rr. 8, 23A, and 23B, of the County Court Rules, 1903 and 1904, to Form 163 in Appendix H to the Rules, and to s. 146 of the County Courts Act, 1888.]

Herbert Jacobs, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an appeal from the Divisional Court and the question is whether a bankruptcy notice for 57*l.* 5*s.* 6*d.* was a good notice upon which subsequent bankruptcy proceedings might be founded. That arises upon a very simple state of facts. There was a judgment in the county court for 57*l.* 5*s.* 6*d.* to be paid on November 7; 10*l.* was paid into Court by the judgment debtor, leaving 47*l.* 5*s.* 6*d.* due. The Divisional Court have held that a bankruptcy notice cannot issue for a larger sum than that for which execution can issue, and that, I think, is perfectly well settled law. They have also held—and so far as I have proceeded I agree with it—that under the County Court Rules there is a rule, which is not to be found in the High Court Rules, that a debtor may pay into Court a sum less than the full amount of the judgment debt. Of course the difference between county court procedure and High Court procedure is very great. In the county court money has not to be paid to the plaintiff, it has to be paid into Court. There is a great deal in the County Court Rules which suggests to me that it is competent for a debtor to pay into Court, and for a county court to receive, a sum less than the full amount of the judgment debt. I would only refer to

(1) [1892] 2 Q. B. 77.

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MILLER, *In re.* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED, *Ex parte.*

Cozens-Hardy M.R.

Order XXV., rr. 23A and 23B, which seem to me to afford strong support for that contention. But however that may be, what are the facts? The county court has this 10*l.* in Court paid by the debtor. It is not for us to say that the receipt of that money by the officer of the Court was wrong. We are not sitting here to revise any orders made by the county court in its general jurisdiction; we are sitting as a Court of Appeal in bankruptcy, and we are considering whether it is right that a bankruptcy notice should be supported when it is for a larger amount than is due, having regard to the fact that 10*l.*, de facto, has been paid into Court. With reference to that it seems to me that we cannot possibly interfere with the judgment creditors if they desire to raise this point or to apply for an order ordering this money to be returned to the judgment debtor. The money is in Court. It being in Court, it seems to me apparent on the Rules that execution could not issue for more than 47*l.* 5*s.* 6*d.*, and, that being so, I think the bankruptcy notice for the larger amount, 57*l.* 5*s.* 6*d.*, is not a good notice.

In my opinion the decision of the Divisional Court was right, and this appeal must be dismissed with costs.

FARWELL L.J. I have come to the same conclusion. I express no opinion whether the registrar ought or ought not to have received the 10*l.* I think there is a great deal to be said against any power to receive money except under an order or in accordance with a judgment or order of the Court, but that is not the question which is before us. Mr. Coumbe argued the case as though the county court were the agent of the plaintiff, but the county court is a Court of this country and is not the agent of the party at all. The money has been paid into Court, and if the receipt of the money by the Court was wrong, steps should be taken to set it right, but sitting in this Court in bankruptcy we are bound to take things as they stand under orders made and payments made in the county court in the exercise of its ordinary jurisdiction, and not its bankruptcy jurisdiction. That being so, it is clear that execution could not issue for more than the 47*l.* 5*s.* 6*d.* It is clear also that a bankruptcy notice cannot issue for more than the amount for

which execution can issue. I therefore agree with the judgment of the Divisional Court, and am of opinion that this appeal fails and must be dismissed.

KENNEDY L.J. I agree, and only wish to add this: I am inclined to think—though it is not necessary to our decision in this case—that that which was done apparently as a matter of course by the registrar in the county court, in receiving the 10*l*., was right. The very fact that an order to pay by instalments may be made, and that certain rights are given to the debtor if he pays by instalments, materially differentiates the procedure in the county court from that which exists in the High Court. I may venture to say that, if there is any obscurity about this question, it is to be hoped that those who have the making of the rules in the county courts will make this point clear one way or the other. I think that the ordinary forms which have been referred to rather tend to shew that the true construction is that the payment is right. I say no more about that. The money in part payment of the judgment debt having been received by the Court, the bankruptcy notice for the full amount of the judgment debt is not a good notice, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Clarke, Lewthwaite & Co.*
Solicitor for respondent: *Percy R. Gibbs.*

G. A. S.

C. A.
1912
May 17, 23;
June 17.

[IN THE COURT OF APPEAL.]

In re HART.
Ex parte GREEN.

Bankruptcy—Voluntary Settlement—Bankruptcy of Settlor—Sale by Voluntary Donee after Act of Bankruptcy—Purchaser for Value without Notice—Title of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property as against the trustee in bankruptcy of the settlor even though the purchase is subsequent to the act of bankruptcy, to which the title of the trustee relates back.

The equitable principle acted on in *In re Carter and Kenderdine's Contract* [1897] 1 Ch. 776, extended.

This was an appeal from a decision of Phillimore J., reported [1912] 2 K. B. 257.

On October 14, 1909, the debtor transferred 250 fully-paid shares in the Hart Accumulator Company, Limited, of which he was a director, to his daughter, Miss Hart, for a nominal consideration, and the transfer was duly registered.

On April 13, 1910, Miss Hart sold and transferred these shares for 187*l.* 10*s.* to Flora Lomas, and the transfer was duly registered. In the meanwhile, on March 31, 1910, the debtor had committed an act of bankruptcy by failing to comply with a bankruptcy notice, served upon him on March 15, and based on two judgments which had been obtained against him by one Green. On April 22, 1910, a receiving order was made against the debtor, which was followed by an adjudication on May 13 and the subsequent appointment of Green as trustee in bankruptcy.

Flora Lomas purchased the shares in good faith and without notice of the debtor's act of bankruptcy or of the fact that the transfer to Miss Hart was without consideration.

In these circumstances Phillimore J. held that the transfer of the shares to Miss Hart was void as against the trustee in bankruptcy under s. 47 of the Bankruptcy Act, 1883, and that the transfer by Miss Hart to Flora Lomas was also void as against the trustee on the ground that the title of the trustee had by

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HART, *In re*
GREEN, *Ex parte.*

relation back to the act of bankruptcy committed by the debtor on March 31, 1910, accrued prior to the date of the transfer; and he ordered Flora Lomas to deliver up the certificate and execute a transfer of the shares to the trustee. From this order Flora Lomas appealed.

Hansell, for the appellant. The question on this appeal is whether the appellant's title as a bona fide purchaser for value without notice can be upset by the trustee in bankruptcy on the ground that his title must be taken to have accrued before the date of the transfer to her. The trustee may have a right against Miss Hart, but it is submitted that he has none against the appellant.

This case is not concluded by the decision in *In re Carter and Kenderdine's Contract* (1), though it comes within the principles on which that decision was based. That case decided that a voluntary settlement is void as against the trustee in bankruptcy from the date of the accruer of his title, but it did not decide the point in this case, namely, whether the settlement is void as against a purchaser for value without notice from a donee under the settlement. It is submitted that Phillimore J. took a wrong view of the dictum of A. L. Smith L.J. in that case (2) that the settlement is void as against the trustee from the date of the act of bankruptcy to which his title relates back. The settlement is not void, but only voidable, and that being so, it falls within the principle of the authorities under the statute 27 Eliz. c. 4, where settlements originally voidable have been validated by subsequent acts: *In re Vansittart* (3); *In re Ewell* (4); *Prodgers* v. *Langham* (5); *Parr* v. *Eliason* (6); *George* v. *Milbanke* (7); *Earl of Aldborough* v. *Trye* (8); *Payne* v. *Mortimer* (9); *Morewood* v. *South Yorkshire Ry., &c. Co.* (10); *Halifax Joint Stock Banking Co.* v. *Gledhill* (11); *Sanguinetti* v. *Stuckey's Banking Co.* (12)

(1) [1897] 1 Ch. 776.
(2) [1897] 1 Ch. 782.
(3) [1893] 2 Q. B. 377.
(4) [1893] 2 Q. B. 381.
(5) (1663) 1 Sid. 133.
(6) (1800) 1 East, 92.
(7) (1803) 9 Ves. 190.
(8) (1840) 7 Cl. & F. 436, 463.
(9) (1859) 4 De G. & J. 447.
(10) (1858) 3 H. & N. 798.
(11) [1891] 1 Ch. 31.
(12) [1895] 1 Ch. 176

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Atkin, K.C., and *Mellor*, for the respondent, the trustee. A voluntary settlement is only made void under s. 47 at the commencement of the bankruptcy. If the settlor becomes bankrupt within two years of the date of the settlement it is void as against the trustee from the accruer of his title. Reading ss. 47 and 43 together it is clear what the Act means, and the authorities are all one way. The transaction is void as from the accruer of the trustee's title: *In re Vansittart* (1); *In re Brall* (2); *In re Carter and Kenderdine's Contract.* (3)

The result of the authorities which are summed up in *In re Tankard* (4) is that from the date of the bankruptcy the settlement is void as against the trustee, and as against him no title can be made.

Sect. 49 gives protection to persons who have had dealings with the debtor up to the date of the receiving order. That protection does not apply to dealings with the donee under a voluntary settlement. It may be a casus omissus under the Act, or it may be that the intention of the Legislature was to discourage voluntary settlements.

In re Reis (5) was a direct decision by Wright J. as to the date of the commencement of the bankruptcy. It was not affected upon that point by the decision of the Court of Appeal. (6) If the settlement is void the equitable doctrine cannot help the purchaser for value. On any other view there would be no protection to creditors at all. If the purchase from the donee under the settlement takes place after the accruer of the trustee's title, it is void as against the trustee, even though the purchaser buys in good faith and without notice of the settlor's act of bankruptcy. The settlement being void as against the trustee, it follows that no dealing with a donee under it can be supported as against the title of the trustee: May on Fraudulent and Voluntary Conveyances, 3rd ed., p. 141.

Hansell, in reply, referred to *In re Teale.* (7)

Cur. adv. vult.

(1) [1893] 2 Q. B. 377.
(2) [1893] 2 Q. B. 381.
(3) [1897] 1 Ch. 776.
(4) [1899] 2 Q. B. 57.
(5) [1904] 1 K. B. 451.
(6) [1904] 2 K. B. 769.
(7) [1912] 2 K. B. 367.

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HYAM v. LOMAS. Cozens-Hardy M.R.

June 17. Cozens-Hardy M.R. The facts in this case are few and are not in dispute, but they give rise to a question of law of great importance and of very considerable difficulty. Hart was the registered owner of fully-paid 1*l.* shares in a limited company of which he was director. On October 14, 1909, he transferred 250 of these shares to his daughter, and the transfer was duly registered. There was no consideration for the transfer. On April 13, 1910, the daughter transferred these shares for value to Flora Lomas, and the transfer was duly registered. Meanwhile a petition was presented on April 4 against Hart, the act of bankruptcy alleged being non-compliance with a bankruptcy notice which had been served upon him on March 15. A receiving order was made on April 22, and Hart was adjudicated a bankrupt on May 13. Flora Lomas had no notice of the act of bankruptcy committed by Hart or of the presentation of the petition. In these circumstances Phillimore J. held that the transfer of the shares to the daughter was and is void as against the trustee under s. 47 of the Bankruptcy Act, 1883, and that the transfer to Flora Lomas was and is void as against the trustee on the ground that the title of the trustee had accrued prior to the date of such transfer, and ordered Flora Lomas to deliver up to the trustee the certificate for the shares and to execute a transfer of the shares to the trustee. From this order Flora Lomas appeals.

Now there is no doubt that the title of the trustee relates back to the act of bankruptcy on March 31 (s. 49), which was prior to the transfer; and it is contended that the language of s. 47 is clear, and that there is no such saving of the rights of a purchaser for value without notice as is found in s. 48, sub-s. 2, or in s. 49.

It is necessary to consider carefully the language of s. 47 and certain decisions upon that section. It was held by Vaughan Williams J. in the case of *In re Brall* (1) that when the statute says that a voluntary settlement is "void against the trustee in the bankruptcy" the word "void" must be construed as meaning "voidable" and not absolutely void. He points out that in all earlier bankruptcy statutes dealing with this subject-matter the

(1) [1893] 2 Q. B. 381.

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settlement was made voidable by the Court although neither the word "void" nor "voidable" was used, and he concludes that the object of the Legislature had remained unchanged and that the purpose of the alteration was merely convenience of drafting. He added that the moment it is assumed that a settlement is not void ab initio, those authorities apply which decide under the statute 27 Eliz. c. 4 that a purchase for valuable consideration from a person making a title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance within the meaning of the Act. So far as I am aware, *In re Brall* (1) has never been questioned, and it was expressly approved of by the Court of Appeal in *In re Carter and Kenderdine's Contract.* (2) It has also been held that s. 47 does not vest the property comprised in the voluntary settlement in the trustee: *Sanguinetti* v. *Stuckey's Banking Co.* (3) In the present case the shares are vested in Flora Lomas, and Phillimore J. has ordered her to transfer them to the trustee. In my opinion the true view is that a voluntary settlement is not void, but is only voidable by the trustee, who must apply to the Court for a declaration to that effect and for consequential relief.

It seems to me to follow that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud or undue influence or otherwise. It is settled law that however good a claim might be as against the grantee, the plaintiff cannot succeed if there has been any subsequent transaction for value and without notice.

On April 13 who was the owner of the shares? Only one answer is possible. Flora Lomas, who acquired them from the registered owner. No question of title had arisen. The property was of such a nature that no investigation of the title of the transferor was possible, and it would be almost shocking to deprive her of the property she acquired in good faith. I think I am entitled to do what was done by Lindley L.J. in *In re Carter and Kenderdine's Contract* (2), namely, "to consider what the consequences would be if the other conclusion were arrived at." No purchaser of shares or stock on the Stock Exchange would be

(1) [1893] 2 Q. B. 381. (2) [1897] 1 Ch. 776.
(3) [1895] 1 Ch. 176.

safe if Flora Lomas is to be deprived of her shares. If I may adopt the words of Lindley L.J., "to my mind good sense is shocked by such a startling construction as that."

The Court of Bankruptcy has always been regarded as a Court of Equity. The Courts of Equity have for centuries refused to grant relief against a purchaser for value without notice in whom or in a trustee for whom a legal title is vested. A good illustration of this is found in *Wilkes* v. *Bodington*. (1) A settlement for valuable consideration was executed after an act of bankruptcy. At that time there was no protecting section corresponding to s. 49. The trustee in bankruptcy filed a bill against the beneficiaries and the trustee of an attendant term. Lord Cowper's judgment more than 200 years ago is short and clear. "I take it to be the rule in equity, that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other; and therefore dismissed the bill."

In my opinion it is strictly in accordance with established principles to hold that the shares cannot be claimed by the trustee against Flora Lomas, and the appeal must be allowed. Whether the trustee can claim against the daughter the purchase-money she received for the shares is a question upon which I express no opinion.

BUCKLEY L.J. On October 14, 1909, Samuel Walter Hart transferred to his daughter Evelyn Maud Hart 250 shares of 1*l.* each in the Hart Accumulator Company. On November 8 the transfer was registered. No pecuniary consideration was paid by the daughter to her father. A contention was set up that valuable consideration was given, but this was not pressed, and for the purposes of this judgment it is to be taken that the transfer was voluntary. On April 13, 1910, Evelyn Maud Hart transferred these 250 shares to Flora Lomas in consideration of 187*l.* 10*s.* which was paid. On April 19 this latter transfer was registered. On March 31, 1910, Samuel Walter Hart had committed an act of bankruptcy, and on April 4 a petition was

(1) (1707) 2 Vern. 599.

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presented against him. On April 22 a receiving order was made. On May 13 he was adjudicated bankrupt, and a trustee was subsequently appointed. When Miss Lomas on April 13 purchased the shares she had no notice or knowledge of the act of bankruptcy or bankruptcy petition. Further, if it be material, although I think it is not [see *In re Brall* (1)], Miss Lomas when she purchased did not know that the shares had been transferred to Evelyn Maud Hart by her father, Samuel Walter Hart, nor that such transfer was not for value, but by a voluntary disposition.

The question for decision is whether under these circumstances, and having regard to s. 47 of the Bankruptcy Act, Miss Lomas has a good title to the shares. Phillimore J. has decided that she has not. He has declared that the transfer of October 14, 1909, to Miss Hart is void as against the trustee under s. 47 of the Act and that the transfer of April 13, 1910, by Miss Hart to Miss Lomas is void as against the trustee on the ground that the title of the trustee had accrued prior to the date of such last-mentioned transfer, and he has ordered Miss Lomas to deliver up to the trustee the certificate for the shares and to execute a transfer to the trustee. From this order this appeal is brought. The question is whether the transfer made and perfected by registration after the act of bankruptcy but before the appointment of the trustee is by s. 47 rendered void as between the trustee and the bona fide purchaser for value without notice.

It has been decided that the word "void" in s. 47 must be construed as meaning "voidable" and not "absolutely void," and that a bona fide purchaser for value from the voluntary donee who has derived title to the property before the date of the commencement of the bankruptcy has a good title against the trustee in bankruptcy. In *In re Vansittart* (2) the disposition by the voluntary donee was made on October 29, 1891, the receiving order was on December 8, 1891, and adjudication on January 9, 1892. The date of the act of bankruptcy does not appear, but from expressions in the judgment I think it is to be inferred that it must have been subsequent to October 29. In *In re*

(1) [1893] 2 Q. B. 381, 385. (2) [1893] 2 Q. B. 377.

Brall (1), the disposition by the voluntary donee was on September 14, 1892, the receiving order was on October 19, and adjudication on November 8. Again the date of the act of bankruptcy does not appear. But these two cases are authorities for the proposition that a purchaser for value without notice who acquires title from the voluntary donee before the commencement of the bankruptcy has a good title as against the trustee in bankruptcy notwithstanding that the voluntary settlement is within the two years or ten years and therefore voidable under s. 47. These two cases were approved in the Court of Appeal in *In re Carter and Kenderdine's Contract.* (2) Had Miss Lomas's purchase therefore been before March 31, 1910, the present case would have been covered by authority. The question is whether the fact that the purchase was after March 31 leads to a contrary conclusion. In my opinion it does not. The reasoning of Lindley L.J. in *In re Carter and Kenderdine's Contract* (3) is, I think, entirely applicable, mutatis mutandis, to the present case. It is impossible to hold that Miss Lomas's title is bad without affirming the proposition that where the transfer is for value from a vendor as to whom the transferee has no knowledge that he is a voluntary donee, or in a case in which if he knows the vendor is a voluntary donee the transferee has no knowledge of any facts which might form a ground for avoiding the voluntary settlement, the transferee takes subject to the danger of its being ascertained ex post facto that as between some trustee in bankruptcy and his transferor the title of his transferor was impeachable under s. 47. No purchase of shares on the Stock Exchange or other dealing for value could, if such were the law, be effected without danger. To use Lindley L.J.'s words, "To my mind good sense is shocked by such a startling construction as that." I have no difficulty in saying, and *In re Carter and Kenderdine's Contract* (2), I think, assists me in saying, that the whole effect of s. 47 is to render the transaction voidable as between the trustee and the voluntary donee, but not as between the trustee and the bona fide purchaser for value without notice from the donee. It may well be that as between the trustee and

(1) [1893] 2 Q. B. 381. (2) [1897] 1 Ch. 776.
(3) [1897] 1 Ch. 781.

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Miss Hart the former has rights in respect of the 187*l.* 10*s.* which the latter received upon the sale of the shares. With this I have nothing to do. As has been pointed out in the cases to which I have referred, the conclusion at which I arrive is fortified by the fact that s. 47 does not contain a clause similar to sub-s. 2 of s. 48 protecting the title of persons taking in good faith and for valuable consideration. For if my construction be right such a provision is not required. For the decision of the present case it is sufficient to say that the bona fide purchaser for value without notice whose title was complete before there came into existence a trustee who could seek to avoid the voidable voluntary settlement has a good title. In my opinion that is the law. It is true that in *In re Carter and Kenderdine's Contract* (1) there are expressions in the judgments which may be used to support the conclusion that the date of the act of bankruptcy to which the title of the trustee relates back is the critical date. But there are also expressions the other way, e.g., where Lindley L.J. says "it" (s. 47) "does not mean that it shall be void before there is a trustee in bankruptcy." Moreover, for the purposes of that case there was no occasion to discriminate between the date of the commencement of the bankruptcy and the date of the appointment of the trustee. There is nothing in that case which compels me to decide contrary to what I hold to be the true construction of the section. I think that this appeal should be allowed and the motion of the trustee dismissed with costs in the Court below and in this Court.

KENNEDY L.J. We have in this case to give a decision upon a point of considerable importance and some difficulty.

On April 13, 1910, Miss Lomas, the appellant, became a purchaser for value from Miss Hart of certain shares in a limited company. At the time of the purchase the title of Miss Hart to this property rested upon a voluntary settlement of the shares upon her which had been made by Mr. Hart, her father, on October 14, 1909. On March 31, 1910, Mr. Hart committed an act of bankruptcy by non-compliance with a bankruptcy notice, a petition was presented against him on

(1) [1897] 1 Ch. 776.

April 4, a receiving order was made on April 22, and he was adjudicated bankrupt on May 13. The respondent on this appeal is his trustee in bankruptcy, who has obtained from Phillimore J. an order setting aside the transfer by Miss Hart to Miss Lomas of April 13. The question on this appeal is as to the correctness of that order. It is common ground that the appellant when she bought the shares from Miss Hart on April 13 was a purchaser not only for value but bona fide, and without notice either of the circumstances under which in 1909 Miss Hart became possessed of the shares or of the act of bankruptcy committed by Mr. Hart on March 31, 1910, or of the bankruptcy petition presented against him on April 4, 1910.

The case of the trustee is founded upon s. 47, sub-s. 1, of the Bankruptcy Act, 1883. That the voluntary settlement of the shares by Mr. Hart, the bankrupt, upon Miss Hart took place within the period of two years before Mr. Hart became bankrupt, and therefore, under the provisions of s. 43, was void as against the trustee in bankruptcy, if the rights as between the trustee and Miss Hart, the donee under the voluntary settlement, were alone in question, does not admit of any doubt. But what the Court has to consider in the present case are the rights as between the trustee in bankruptcy and the appellant, the purchaser from Miss Hart.

If we eliminate from consideration the fact that the sale by Miss Hart to the appellant took place after the date of the commission by Mr. Hart of the act of bankruptcy, I think that the decision of this Court in *In re Carter and Kenderdine's Contract* (1) is a sufficient authority for a decision in favour of the appellant. It was there held that according to the true construction of s. 47 of the Bankruptcy Act, 1883, a voluntary settlement is not void as against the settlor's trustee in bankruptcy from its date, but is only void as against the trustee from the time when his title accrues, so that, if before that time the property comprised in the settlement has been sold bona fide to a purchaser for value, the title of the purchaser will be good as against the trustee.

(1) [1897] 1 Ch. 776.

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The difficulty in the present case arises from the fact which was not present in the case which I have cited, namely, the fact that the appellant purchased after the commission by the bankrupt of an act of bankruptcy, upon which the adjudication within three months afterwards took place. By the force of s. 43 the bankruptcy had relation to and commenced at the date of the commission of this act of bankruptcy, and the words "becoming bankrupt" in s. 47 have been held by Wright J. (though not without doubt) in *In re Reis* (1) to refer to the date specified in s. 43 as the commencement of the bankruptcy. His decision on this point is unaffected by the reversal of his judgment on other grounds by the Court of Appeal. (2) Moreover, the same opinion as to the interpretation of the words "become bankrupt" in s. 47 was expressed both by A. L. Smith L.J. and by Rigby L.J. in the course of their judgments in *In re Carter and Kenderdine's Contract.* (3) A. L. Smith L.J. (4) said, in reference to the words of s. 47 "void against the trustee in bankruptcy," "What do they mean? They mean void against the trustee in bankruptcy from the date of the accruer of his title, or, in other words, void from the date of the act of bankruptcy to which the title of the trustee relates back." Rigby L.J. (5), referring to the case of *In re Holden* (6), said: "I have not the slightest doubt that *In re Holden* (6) was rightly decided; and it comes to this, that every equity which has been acquired before the act of bankruptcy, which is the beginning of the bankruptcy, is to be respected, and is not in any way hit or interfered with by s. 47." There is nothing to the contrary in the judgment of Lindley L.J., who was the other member of the Court.

This Court has, therefore, in the present case to decide upon facts which raise a point which had not to be decided in *In re Carter and Kenderdine's Contract* (3), namely, whether the purchaser for value of property which his seller has derived from the bankrupt under a voluntary settlement void as against the trustee in bankruptcy under s. 47 can resist the trustee's claim to avoid the transaction, although the transaction has taken

(1) [1904] 1 K. B. 451.
(2) [1904] 2 K. B. 769.
(3) [1897] 1 Ch. 776.
(4) Ibid. at p. 782.
(5) Ibid. at p. 784.
(6) (1887) 20 Q. B. D. 43.

place after the commission by the bankrupt of an act of bankruptcy, and therefore after the accrual of the trustee's title, provided that, as is the case here, the purchaser had not any notice of the commission of the act of bankruptcy. The trustee in bankruptcy, the respondent to the present appeal, contended that, as his title had already accrued before the date of the appellant's purchase, the seller had at the time, as against him, no title to the property, and the appellant could take nothing under her purchase; and Phillimore J. has adopted this view of the law. The question does not appear to me to be an easy one, but, upon the whole, I find myself unable to arrive at the same conclusion. I admit that I cannot find within the words of the Bankruptcy Act itself any provision which purports to give protection to the purchaser in such circumstances as those of the present case, but I am prepared to hold that, in regard to the rights of the parties—that is, the trustee in bankruptcy on the one hand, and on the other hand the purchaser for value without notice either of the voluntary conveyance under which the seller acquired title from the bankrupt or of the existence, at the time of his purchase, of a prior act of bankruptcy committed by the voluntary settlor—the Court ought to extend the equitable principle acted upon in *In re Carter and Kenderdine's Contract* (1) in favour of the appellant. And I find, I think, a strong support for this view in a judgment which was not cited either in the argument before Phillimore J. or in the argument before us. It is the judgment of Wright J. sitting as bankruptcy judge in the case of *In re Slobodinsky, Ex parte Moore*. (2) The learned judge there said: "It may be that, although s. 49 in its terms protects only those alienees who have taken immediately from the debtor, some degree of protection may be supplied on grounds of equity even to secondary alienees. In case of settlements avoided under the statute of Elizabeth, or under s. 47 of the Bankruptcy Act, 1883, it has been found possible even at law to protect persons who before the occasion for avoiding a settlement has arisen have become purchasers or incumbrancers for value without notice of grounds of avoidance." I pause here for a moment to point out that this statement is in accord with the decision of

(1) [1897] 1 Ch. 776. (2) [1903] 2 K. B. 517, at pp. 531, 532.

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the Court of Appeal in the case, already referred to, of *In re Carter and Kenderdine's Contract.* (1) Then the learned judge proceeded: "There is much greater difficulty in cases like those which are now in question, where the trustee's title is established by relation back, and the statute contains no applicable exception." I pause again to point out that the present case is precisely that to which the learned judge here refers. He then proceeded: "It is, indeed, sufficient to refer to cases like *Copland* v. *Stein* (2) and *Nunes* v. *Carter* (3), in order to shew that an alienee, however innocent, was not aided at law except in cases specified by the statutes for the time being in force. Equity, however, did not altogether refuse relief: see *Abery* v. *Williams* (4); *Collet* v. *De Gols* (5); *Latouche* v. *Lord Dunsany* (6); *Wilkes* v. *Bodington* (7); and it may be that at the present day it would be right to apply or even extend the equitable doctrine. That, however, could only be done in favour of a purchaser whose title is without stain." The learned judge proceeds to add a view as to the limitation of the equitable right in respect of the quantum of the consideration, the correctness of which may be open to question, but which, as no point as to the amount of consideration paid by the appellant has been raised between the parties to these proceedings, it is immaterial to consider. The title of the purchaser, Miss Lomas, is without stain, and I hold that in dealing with the rights of the appellant and respondent this Court ought to apply the equitable principle which Wright J. explicitly recognized in the passage which I have just cited, but found himself prevented by the particular facts from applying in the case then before him.

I desire only to add, not as a reason for this conclusion, but as a ground of satisfaction in being able to adopt it, that if this Court were obliged to decide otherwise, a disturbing element of doubt as to title would be introduced into the large class of business which consists in dealing with shares. I concur with the Master of the Rolls and Buckley L.J. in saying that our

(1) [1897] 1 Ch. 776.
(2) (1799) 8 T. R. 199.
(3) (1866) L. R. 1 P. C. 342, 349.
(4) (1681) 1 Vern. 27.
(5) (1734) Cas. t. Talb. 65.
(6) (1803) 1 Sch. & Lef. 137, 152.
(7) 2 Vern. 599.

conclusion does not involve the expression of any opinion whether the trustee may have any claim against Miss Hart in respect of the proceeds of the sale of the shares.

I think that this appeal should be allowed.

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Appeal allowed.

Solicitors for appellant: *Geare & Willis, for W. Tottle, Sheffield.*

Solicitor for respondent: *James Turner.*

G. A. S.

[COURT OF CRIMINAL APPEAL.]

1912 June 10.

REX *v.* WILLIAM ARNOLD THOMSON.

Criminal Law — Evidence — Charge of Illegal Operation upon a Woman — Statements made by Deceased Woman before and after Miscarriage — Admissibility as Evidence for Defence.

At the trial of the appellant upon a charge of having used an instrument upon a woman in order to procure miscarriage, his defence was that he had done nothing to her, but that she had performed such an operation upon herself. His counsel, in cross-examination, sought to ask questions of a witness for the prosecution as to statements made by the woman (who was dead) some time before her miscarriage that she intended to operate upon herself, and shortly after her miscarriage that she had operated upon herself; but the learned judge refused to permit these questions:—

Held, that these statements, being mere hearsay, were not admissible in evidence for the defence.

Appeal to the Court of Criminal Appeal against a conviction at the Central Criminal Court.

The appellant was tried before Phillimore J. upon a charge of using an instrument upon a woman on March 21, 1912 for the purpose of procuring miscarriage. The woman died on March 31, but not as a result of the operation. The defence set up was that the appellant had done nothing to the woman, but that she had performed the operation upon herself.

At the trial counsel for the accused proposed to ask one of the

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witnesses for the prosecution in cross-examination whether the deceased woman had made in the month of February, 1912, a statement that she intended to perform an operation upon herself in order to procure miscarriage, and on March 29, a statement that she had performed such an operation upon herself. The learned judge ruled that this evidence was inadmissible and that these questions could not be asked. The accused was found guilty and sentenced to three years' penal servitude.

The accused appealed upon the ground (among others) that the learned judge was wrong in law in refusing to admit the evidence as to statements made by the deceased woman.

Sturges, for the appellant. The statements made by the deceased woman that she intended to perform and that she had performed upon herself the operation which the appellant was charged with having performed were admissible in evidence on behalf of the accused. His defence was that he had not done anything to the woman, but that she had used an instrument upon herself. When a prisoner properly sets up a defence he ought to be permitted to prove it by any relevant evidence which he can adduce, and this evidence was of vital importance to his defence. In *Reg.* v. *Edwards* (1) a statement made by a murdered woman a week before the murder was admitted in evidence, and that case is a direct authority in favour of the appellant.

[LORD ALVERSTONE C.J. referred to *Reg.* v. *Gloster*. (2)]

The ruling of Charles J. in that case was only the dictum of a single judge. The accused is entitled to adduce any evidence which will prove his defence whether it is admissible according to the strict rules of evidence or not. [He also referred to *Reg.* v. *Bedingfield*. (3)]

R. D. Muir (*Travers Humphreys* with him), for the prosecution. This evidence, being merely hearsay, was clearly inadmissible. If the contention of the appellant were right, all the learning, arguments, and decisions as to statements being admissible in evidence as part of the res gestæ or as dying

(1) (1872) 12 Cox, C. C. 230. (2) (1888) 16 Cox, C. C. 471.
(3) (1879) 14 Cox, C. C. 341.

declarations would have been quite superfluous. This is simply a question as to admissibility of evidence, and the rule is the same whether the prosecution or the defence seeks to give the evidence. If this kind of hearsay evidence were admissible for the defence, it would be equally admissible for the prosecution. It is clear from the authorities that it is not admissible: *Reg.* v. *Wainwright.* (1)

[He was stopped by the Court.]

Sturges replied.

The judgment of the Court (Lord Alverstone C.J., Darling and Avory JJ.) was delivered by

Lord Alverstone C.J. This point is one of importance and at first appeared to be difficult. Counsel for the appellant was not allowed in cross-examination to put questions to a witness for the prosecution as to what the deceased woman had told her some time before the miscarriage as to her intentions and also a few days before her death as to what she had done. If put in a popular way, the argument for the appellant, that what the woman had said she had done to herself ought to be admissible evidence for the defence, might be attractive; but upon consideration it is seen to be a dangerous argument, and, in the opinion of the Court, the rejection of evidence of that kind is much more in favour of the accused than of the prosecution. If such evidence is admissible for one side it must also be admissible for the other.

In our opinion there is no principle upon which this evidence is admissible any more than any other hearsay evidence. If it were admissible, then all those decisions in which it was considered whether statements were admissible in evidence as dying declarations, or as part of the res gestæ, or as admissions against pecuniary or proprietary interest, would have been unnecessary. The only ground upon which it has been suggested in argument that such evidence ought to be admitted is that since the Criminal Evidence Act, 1898, and the Criminal Appeal Act, 1907, a new rule of evidence has been introduced under which anything must be admitted in evidence which will help the

(1) (1875) 13 Cox, C. C. 171.

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accused to prove his defence. There is a decision of a great authority, Charles J., against that contention. In *Reg.* v. *Gloster* (1) the prisoner was charged with having caused the death of a woman by an illegal operation, and it was sought to give in evidence statements made by the woman a few days after the operation as to who had caused the injuries from which she died. Charles J. refused to admit the evidence and said: "Mr. Poland proposes to ask the witness what the deceased said as to her bodily condition and what had been done to her. My judgment is this: that the statements must be confined to contemporaneous symptoms and nothing in the nature of a narrative is admissible as to who caused them or how they were caused." In this case it cannot be argued that the statements were admissible as part of the res gestæ; the statements sought to be proved were not made at the time when anything was being done to the woman.

In our opinion the ruling of the learned judge in rejecting this evidence was correct and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Indermaur & Brown, for Weed & Mason, Maidenhead.*

Solicitor for the prosecution: *Director of Public Prosecutions.*

(1) 16 Cox, C. C. 471.

J. H. W.

THE KING *v.* THE REGISTRAR OF COMPANIES.

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May 21.

Company—Registration—Name of proposed Company—Similarity to Name of Company already registered—Calculated to deceive—Refusal of Registrar to register—Mandamus—Discretion of Registrar—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 8, *sub-s.* 1; *s.* 15.

Upon an application under s. 15 of the Companies (Consolidation) Act, 1908, to the Registrar of Companies to register a company with the name "The Water Softening Materials Company (Sofnol), Limited," the registrar refused to register it upon the ground that the name so nearly resembled that of "Water Softeners, Limited," an existing company already registered, as to be calculated to deceive within the meaning of s. 8, sub-s. 1, of the Act. The applicants applied for a writ of mandamus to the registrar to register the company with that name upon the grounds that he was required to do so under s. 15 and that the name did not so nearly resemble that of any company already registered as to be calculated to deceive:—

Held, that the mandamus must be refused as there was no ground for saying that the registrar, in exercising his discretion, had come to a wrong decision.

Per Avory J.: The registrar having to exercise a discretion in the matter, the Court would not be justified in interfering by mandamus unless either the registrar had not in fact exercised any discretion in the particular case, or had exercised it upon some wrong principle of law, or had been influenced by extraneous considerations which he ought not to have taken into account.

RULE calling upon the Registrar of Companies to shew cause why a writ of mandamus should not issue directed to him commanding him to retain and register pursuant to the statutes in that behalf the memorandum and articles of association delivered to him by the Water Softening Materials Company (Sofnol), Limited, upon the grounds that he was required so to do under s. 15 of the Companies (Consolidation) Act, 1908, and that the said name was not identical with the name by which any company is registered and did not so nearly resemble the name of any such company as to be calculated to deceive under s. 8, sub-s. 1, of the Act. (1)

(1) 8 Edw. 7, c. 69, s. 8: "(1.) A company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being

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The above rule was obtained at the instance of James Hugh Paul, Jens Jakob Lassen, and Vilhelm Frederik Hjort, the three subscribers to the memorandum and articles of association of the above-named company, which it was sought to register as a private company under the Act.

It appeared from the affidavit filed by James Hugh Paul in support of the rule that the deponent had for the last six years carried on, under the name of "The Water Softening Materials Company," at Westcombe Hill, Greenwich, the business of the manufacture and sale of materials and of a mixture called and registered as "Sofnol" for the industrial treatment of water. Since March 1, 1912, the business had been carried on under the said name at the said address by him in partnership with Jens Jakob Lassen and Vilhelm Frederik Hjort. On March 26, 1912, the deponent on behalf of himself and his partners applied, through their solicitor, to the Registrar of Companies for the registration of a private company to carry on the said business with the name of "The Water Softening Materials Company, Limited." The three subscribers to the memorandum and articles of association were the deponent and his two partners. The registrar refused to register the name of the company on the ground that it too nearly resembled the name of an existing registered company. The affidavit stated that the registrar had no right to refuse to register the name of the company, but, in order to avoid any difficulty and expense in the matter, on April 13, 1912, the deponent on behalf of himself and his two partners, being the three subscribers as aforesaid, applied through their solicitor to the registrar for registration of the company with the name of "The Water Softening Materials Company (Sofnol), Limited." On April 19, 1912, the registrar, acting under the advice of the Board of Trade, refused to register the company in that name upon the ground that the name so

dissolved and signifies its consent in such manner as the registrar requires."

Sect. 15: "The memorandum and the articles (if any) shall be delivered to the Registrar of Companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them."

nearly resembled that of "Water Softeners, Limited," a company already on the register, as to be calculated to deceive. He, however, expressed his willingness to register a company with the name "Sofnol Water Softening Materials Company, Limited," which was refused. (1) The affidavit further stated that the company "Water Softeners, Limited," was incorporated on February 23, 1911, or about five years after the deponent had commenced to carry on his business of the Water Softening Materials Company, and the main object and principal business of that company were not the same as the deponent's said business nor the same as would be carried on by "The Water Softening Materials Company (Sofnol), Limited"; that the words "water softening" and "water softeners" had long been generic words in common use of ordinary descriptive character without any secondary meaning; that the name "The Water Softening Materials Company (Sofnol), Limited," was not identical with the name by which any company in existence was registered, nor did it so nearly resemble any name of any such company as to be calculated to deceive; and that it was the duty of the registrar in accordance with the Companies (Consolidation) Act, 1908, to retain and register the memorandum and articles of association of "The Water Softening Materials Company (Sofnol), Limited."

Sargant (*S. A. T. Rowlatt* with him), for the Registrar of Companies, shewed cause. The registrar in the exercise of his discretion refused to retain and register the memorandum and articles of association of the proposed company, the Water Softening Materials Company (Sofnol), Limited, under s. 15 of the Companies (Consolidation) Act, 1908, upon the ground that the name of the company so nearly resembled the name of an

(1) It was stated on behalf of the applicants in the course of the argument that notice of the application for a mandamus was given to Water Softeners, Limited, who had not raised any objection. It was also stated that the reason why the applicants refused to put "Sofnol" at the beginning of the name was that the business had been carried on for six years under the name of the Water Softening Materials Company, and that the applicants had acquired a goodwill in connection therewith which might be lost or endangered if the name was altered.

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existing company, "Water Softeners, Limited," which is already registered, as to be calculated to deceive within the meaning of s. 8, sub-s. 1, of the Act. The registrar's view is that the first two words of each name are too much alike, and that, considering the well-known habit of the public to abbreviate names, the two companies are likely to be confused. There does not seem to be any case in which a mandamus to the Registrar of Companies has been granted, but it is not now contended that there is no power to issue a mandamus. If a company has by inadvertence been registered under a name which so nearly resembles the name of a company which is already registered as to be calculated to deceive, the latter company can obtain an injunction to restrain the new company from carrying on under that name a business of the same kind as that of the old company. Or an existing registered company, if it hears of the application to register a new company with a name so nearly resembling its own name as to be calculated to deceive, may apply for an injunction to restrain the registration. In Buckley on Companies, 9th ed., p. 14, a list of cases is given in which the Court has refused to grant an injunction, and on p. 15 two or three cases are referred to in which an injunction has been granted. The discretion given to the registrar under s. 8, sub-s. 1, of the Companies (Consolidation) Act, 1908, is substantially the same as that given to the Registrar of Trade Marks under s. 12 of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), upon an application to register a trade mark, s. 19 prohibiting the registration of a trade mark in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive. Under s. 12, sub-s. 3, of that Act there is an appeal from the decision of the registrar to the Court, whereas there is no appeal from the decision of the registrar under the Companies (Consolidation) Act, 1908, and in that respect the position of the Registrar of Companies is stronger than the position of the registrar under the Trade Marks Act, 1905. However, the registrar desires the Court to correct him if it comes to the conclusion that he has exercised his discretion wrongly. In *Exp.* v.

Dunn (1) Lord Watson said that upon an application to register a trade mark the onus of shewing that the trade mark was not calculated to deceive rested on the applicant. The same rule applies to an application to register a company. That principle applies here. No case has been made out for interfering with the exercise by the registrar of his discretion, and, further, even if this Court had to decide the matter de novo they would come to the same conclusion as the registrar arrived at. In *Lorators, Ld.* v. *Tollitt* (2) an application for an injunction to restrain the registration of a new company with a name alleged to be similar to that of the plaintiff company was refused. The company proposed to be registered was called "Automatic Aerators Patents, Limited," so that the only word common to both companies was "aerators." There was therefore no similarity at all. It was really an attempt to establish the exclusive right of the plaintiff company to the use of the word "aerators," a word in ordinary use representing a machine. *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.* (3) was a case where after registration an application for an injunction to restrain the defendant company from using the words "vacuum cleaner" as part of its name in such a way as to lead the public to suppose that the companies were the same or connected with each other was refused. There the first word, which is the most important part of the name considering the habit of abbreviation, was different; and Parker J. came to the conclusion that both names were merely descriptive of the machine or process used by the two companies, and he held that one company had no right to a monopoly of the words. *Ceylon Estates, Ld.* v *Ceylon Rubber Estates, Ld.* (4) was a case where an application for a somewhat similar injunction was granted. There the first word of each name, though spelt differently, was pronounced alike, and the Master of the Rolls said that the case ought to be decided "on the view." Considering the habit of the public to abbreviate names, the company which it is proposed to register will be called the Water Softening Company, and that name so

(1) (1890) 15 App. Cas. 252, at p. 257.
(2) [1902] 2 Ch. 319.
(3) [1907] 2 Ch. 312.
(4) (1910) 27 Rep. Pat. Cas. 753.

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nearly resembles the name of the registered company as to be calculated to deceive. If this Court had to decide the question de novo, it would say that there was too great a similarity between the two names, but it is not necessary for the Court to decide that, because this matter was within the discretion of the registrar, and no case has been made for interfering with the exercise of his discretion.

Gore-Browne, K.C., and *Brackenbury*, in support of the rule. The position of the Registrar of Companies is different from that of the registrar under the Trade Marks Act, 1905, because under s. 12, sub-s. 2, of that Act, "Subject to the provisions of this Act the registrar may refuse such application"—that is, an application to register a trade mark—"or may accept it absolutely or subject to conditions, amendments, or modifications," subject under sub-s. 3, to an appeal to the Board of Trade or the Court at the option of the applicant; and s. 19 contains a somewhat similar provision to that contained in s. 8, sub-s. 1, of the Companies (Consolidation) Act, 1908. Therefore the registrar under the Trade Marks Act, 1905, has a discretion to register or to refuse to register subject to appeal from the exercise of his discretion. Under s. 15 of the Companies (Consolidation) Act, 1908, the registrar is bound to retain and register the memorandum and articles of association of a company which it is proposed to register. He has no discretion. But he must not do anything which is unlawful. By s. 8, sub-s. 1, "a company may not be registered by a name identical with that by which a company in existence is already registered"—that is to say, two identical names must not be on the register at the same time—"or so nearly resembling that name as to be calculated to deceive." The registrar has to apply his mind to a question of fact, whether the name is or is not calculated to deceive. If it is, he has no discretion; he must refuse to register. If it is not, again he has no discretion; he must register, and if he does not perform his statutory duty the Court will direct him to perform it. The Act does not say that the registrar shall not register a company under a name which in his opinion is calculated to deceive. It is not a question of opinion. If the registrar has made a mistake in the facts the Court will

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set him right. The registrar, who is a public officer, has a number of duties to perform under the Act. For instance, he has a duty to register a mortgage by a company, and if he thinks that the mortgage does not comply with the Act and refuses to register it, the Court will, for the protection of the mortgagee, if it thinks that the registrar has come to a wrong conclusion, direct him by mandamus to register it. In the same way the Court will, if the fact is that the names of the two companies are not so similar as to be calculated to deceive, direct him to register the company. The remedy by injunction to restrain Water Softeners, Limited, from carrying on business under that name would not be available, because no Court would say that there was any possibility or probability of the two names being confused. Moreover the businesses of the two companies are not the same. Water Softeners, Limited, deal in plant and machinery to soften water and also use chemicals for that purpose, and the new company supplies its own chemicals to be put into water for the purpose of softening it. The onus is not upon the applicants to shew that the name is not calculated to deceive. The test is whether it is shewn that the name is calculated to deceive. There is no possibility of deception in this case. It is a question of fact whether a particular name is or is not calculated to deceive, and if this Court is of opinion that it is not, it will grant a mandamus directing the registrar to register the company. It is a condition precedent to the registrar's refusal to register that the name is calculated to deceive. The act of the registrar is a ministerial act. He is not a judicial officer who has to hear and determine. He is bound under s. 15 to register unless he sees that there is something forbidden by the Act, in which case he is absolved from the duty of registering. If there is nothing contrary to the Act he has a ministerial duty to register. The registrar must see that the proper number of persons have subscribed the memorandum and articles of association, and if they have not he must refuse to register, but in so doing he does not act as a judicial officer. So also if he refuses to register an agreement upon the ground that it is not properly stamped, the Court will, upon proof that the stamp is sufficient, order by mandamus the registrar to register. In such cases the registrar

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does not exercise judicial functions. He is a public officer who has a statutory duty to perform, and if he improperly refuses to perform it the Court will by mandamus order him to do so. The applicants did not accept the offer of the registrar to put "Sofnol" first, as they have a goodwill in connection with their name, and they wish to preserve that goodwill and to protect their right of property. In *Aerators, Ld.* v. *Tollitt* (1) Farwell J., in discussing what sort of a name had been adopted by the old company, pointed out that the plaintiffs claimed a monopoly in the word "aerators" and said: "In considering whether a name is calculated to deceive it is, as I have said, material to see what that name is; and if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even of the name of a place. The latter may well point to a particular company; the former certainly points prima facie to the machine or article, and can only under very exceptional circumstances and by a long course of usage point to the company rather than the thing itself." And later on he said (2): "A name is not necessarily calculated to deceive because it is similar; it must depend in great measure upon what the nature of the name is; and if it merely represents the name of the article supplied by the company, it would require very strong evidence to shew that such name had lost its primary meaning, and had become identified with the plaintiff company." In this connection it is material to consider whether the word common to the names of both companies is in general use as a generic word descriptive of an article which has not acquired a secondary meaning as denoting articles manufactured or sold by one of the companies: *Electromobile Co.* v. *British Electromobile Co.* (3) The words of the names here describe an article or a process, and the Court ought not to assume that the names of the two companies so nearly resemble each other as to be calculated to deceive. The registrar had no evidence before him, nor had he any means by which he could take evidence. The Court

(1) [1902] 2 Ch. 319, at p. 324. (2) [1902] 2 Ch. at p. 325.
(3) (1907) 98 L. T. 258.

ought to decide, as the Master of the Rolls said in *Ural Ceylon Estates, Ld.* v. *Ura Ceylon Rubber Estates, Ld.* (1), "on the view," that is to say, on the words themselves, that the name of the new company is not calculated to deceive. The registrar, therefore, was bound to register the new company under its proposed name. The argument that the names are calculated to deceive because the public will call the company by the first words of the name and leave out the rest is not correct; the public sometimes use the first word or words and sometimes the later word or words. The argument would really apply to every pair of names which have words in common. As Lord Low said in *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (2), a passage which was cited with approval when that case was in the House of Lords (3), "Any one, however, who took the trouble to think about the matter would see that the respondents' company was a motor company and the complainers' a tyre company. . . . . Now, I do not think that the respondents are liable to have their business practically stopped (unless they change their name) simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers." The two companies here deal in different articles, and so there can be no confusion between the businesses they carry on. The rule ought therefore to be made absolute. No further materials could be brought before the Court if a return were made to the mandamus, and so the application is for a peremptory mandamus to register.

LORD ALVERSTONE C.J. This rule must be discharged. If there were anything in the affidavit filed in this case which raised a doubt in my mind so as to require further investigation or make further investigation desirable, then we might say that we would not express a final opinion upon the matter, but would allow the writ to issue so as to have a return made. But in my opinion there are no materials here to justify us in taking that course. It is admitted that prima facie under s. 15 of the Companies (Consolidation) Act, 1908, the registrar,

(1) 27 Rep. Pat. Cas. 733, at p. 756.

(2) [1906] 8 F. 1146, at p. 1165.

(3) [1907] A. C. 430, at p. 438.

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Lord Alverstone C.J.

when he receives the memorandum and articles of association, is to retain and register them; but it is also admitted that under s. 8, sub-s. 1, if in fact the name of the company which it is proposed to register is calculated to deceive (I will not for the moment introduce the words "in the opinion of the registrar") he is not to register them. It seems to me that in a great many cases that question must be decided by the opinion of the registrar. It is true that it may be called a decision of fact, but the only materials before the registrar are those which enable him to decide whether the name is calculated to deceive; and therefore, though the words "in the opinion of the registrar" are not in s. 8, sub-s. 1, the section cannot be worked in practice unless the registrar is allowed to form an opinion upon the question of fact. The difficulty inherent in that view seems to have been appreciated when the rule was applied for, and so the rule calls upon the registrar to shew cause why he should not retain and register the memorandum and articles of association delivered to him upon the grounds that he is required to do so under s. 15 and that the name is not identical with the name by which any company is registered and does not so nearly resemble the name of such company as to be calculated to deceive under s. 8, sub-s. 1, of the Companies (Consolidation) Act, 1908.

In my opinion we could not make the rule for a mandamus absolute unless we came to the conclusion either that the name was not calculated to deceive, or that there was so much doubt in the matter or such dispute of fact that we thought it desirable to allow the writ to issue that a return might be made in order to have further investigation upon further materials. There is nothing to lead me to believe that the name is not calculated to deceive. If the words "Water Softeners, Limited," and "Water Softening Materials Company, Limited," are not calculated to cause confusion and thus to deceive, I fail to understand what the one is supposed to mean as distinct from the other. It is said that one company deals in machinery and the other in chemicals, but we are also told that a part of the business of Water Softeners, Limited, is the supply of chemicals. In these circumstances I cannot say that the names may not, as between the two companies, be calculated to deceive,

and in considering this question I am a good deal influenced by the fact that the registrar offered to register the company with the proposed name if the applicants placed the word "Sofnol" first. It is said, and there may be good reason for it, that some of their customers would think that it was a different company because they have not seen the word "Sofnol" used in connection with the applicants' business. If the applicants are willing to put the word in as a distinguishing word at the end of the name, I cannot see why, in order to be safe against deception, they should not consent to put it in at the beginning. To my mind there is a good deal in the view that the words "Water Softeners" and "Water Softening Materials" in the two names would be calculated to deceive. Therefore I am unable to find as a fact on the materials before us that the name is not calculated to deceive so as to enable me to order the registrar to register the company under the proposed name, and the rule for a mandamus must be discharged.

PICKFORD J. I am of the same opinion. If I thought that there was any further information which would enable us to form a better opinion on the question of fact as to whether the use of this proposed name was calculated to deceive, I should have thought that the writ ought to issue in order that a return might be made to it, because that would not be deciding finally that the registrar was wrong, but merely ordering the writ to issue in order that he might return the reason for his refusal to register. But I do not think that on a return to the writ the Court would be in any better position than they are in at the present moment. It seems to me that in order that the writ should issue the Court must be satisfied that the registrar has come to a wrong conclusion on the question of fact, whether or not this name was calculated to deceive. Whether that would of itself be sufficient I do not say, but at any rate the Court must come to that conclusion before they could act in any way. I am inclined to think that on an application of this sort the onus is upon the applicants to shew that the name is not calculated to deceive, according to the reasoning of Lord Watson in *Eno* v. *Dunn* (1), but I do not

(1) 15 App. Cas. 252, at p. 257.

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Pickford J.

lay any stress upon the question of onus. Looking at the whole of the case as it is before us, all I can say is that I personally am not satisfied that the registrar came to a wrong decision, and not being satisfied of that, it seems to me impossible that I can order the writ to issue. I agree, therefore, that the rule should be discharged.

AVORY J. I agree that this rule should be discharged, though upon a somewhat broader ground. In my opinion this rule could only have been made absolute if the applicants had satisfied us that the duty of the registrar under ss. 8 and 15 of the Companies (Consolidation) Act, 1908, was purely ministerial. I think that the moment it is admitted that the registrar must exercise some discretion in the registration of a company, the name of which is suggested to be either identical with that of another company already registered or so nearly resembling it as to be calculated to deceive, then in order to displace the decision of the registrar and justify this Court in interfering by mandamus it would be necessary for the applicants to shew one or more of three things: either that the registrar had not in fact exercised any discretion in the particular case, or that he had exercised it upon some wrong principle of law, or that he had been influenced by extraneous considerations which he ought not to have taken into account. I think that one of these three things at least must be made out to justify this Court in interfering by mandamus. It is important to bear in mind the distinction between mandamus and a right of appeal, and I am impressed by the difference between this Act and the Trade Marks Act, 1905, under which latter Act an appeal lies from the decision of the registrar. For these reasons I think that the rule should be discharged.

Rule discharged.

Solicitor for applicants: *Stanley B. Worth.*
Solicitor for respondent: *Solicitor to Board of Trade.*

W. F. B.

HEWETT *v.* HATTERSLEY.

1912
May 14.

London—Offences—Unsound Fish intended for Food of Man—Prosecution—Condition Precedent—Condemnation by Justice of the Peace—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-s.* 2.

By s. 47, sub-s. 2, of the Public Health (London) Act, 1891, "if it appears to any justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same . . . .; and the person . . . . on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the Court, without the infliction of a fine, to imprisonment for a term of not more than six months, with or without hard labour":—

Held (Pickford J. dissenting), that the words "so condemned" must be read as "so liable to be condemned," and that therefore condemnation by a justice of the peace of an animal or article which has been seized or is liable to be seized under the section is not a condition precedent to a summary conviction for an offence under the sub-section.

Case stated by an alderman of the city of London.

An information was laid against the appellant Hewett by the respondent under the Public Health (London) Act, 1891, s. 47, sub-s. 2 (1), for that the appellant on October 6, 1911, in the

(1) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47, sub-s. 1: "Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine

"(*a*) any animal intended for the food of man which is exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and

"(*b*) any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale,

the proof that the same was not exposed or deposited for any such purpose or was not intended for the food of man, resting with the person charged; and if any such animal or article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sub-s. 2: "If it appears to any justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man

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city of London, was the person on whose premises were found certain fish, namely, about 600 plaice contained in four boxes, the fish being intended for the food of man and being deposited for the purposes of sale at his premises and being unfit for the food of man.

Upon the hearing of the information the following facts were proved:—

The appellant was a fish salesman occupying a stall in Billingsgate Market. The respondent was a chief inspector in the employ of the Worshipful Company of Fishmongers of London and laid the information against the appellant under the directions and on behalf of the company.

At about 7 o'clock A.M., on October 6, 1911, the respondent found on the appellant's stall four boxes containing fish, piled one upon another. The uppermost box was open. The alderman was satisfied that they were deposited at the appellant's stall for the purpose of sale for the food of man. Upon the respondent examining the uppermost and the other boxes he found good, fresh, and wholesome ungutted plaice on the top of each box, but underneath smaller gutted plaice in a condition putrid and unfit for food. In four boxes there were about 600 fish in a condition unfit for food.

he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the Court, without the infliction of a fine, to imprisonment for a term of not more than six months, with or without hard labour."

Sub-s. 3: "Where it is shown that any article liable to be seized under this section, and found in the possession of any person was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned under this section, the person who so sold the same shall be liable to the fine and imprisonment above mentioned, unless he proves that at the time he sold the said article he did not know, and had no reason to believe, that it was in such condition."

After examination of the contents of the four boxes the good fish were returned to the appellant, and the bad destroyed by officers of the company.

The four boxes had been consigned to the appellant from Lowestoft and had arrived at Billingsgate that morning, but had not been personally examined or inspected by the appellant, who had no personal knowledge of the condition of the contents. The appellant was, however, personally present at his stall when the respondent found the four boxes as above described, having arrived there shortly before the respondent found the boxes of plaice.

Upon the above-mentioned facts being reported to the company, by the direction of the company the information against the appellant was duly laid.

There had not been any one engaged in the seizure, examination, and destruction of the bad fish other than officers of the company.

The fish had not been brought before nor condemned by any justice, and no order of any justice was made for the destruction or disposal of the bad fish.

On behalf of the appellant it was contended that the information should be dismissed on the ground that the condemnation by a justice of an article deposited for sale and intended for the food of man and unfit for the food of man is a condition precedent to a prosecution for the offence dealt with under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, and that no proceedings in respect of the deposit for the purpose of sale of food unfit for the food of man can under s. 47, sub-s. 2, be taken by or on behalf of the company or by any other person until the articles so deposited and which are the subject of the proceedings have been condemned by a justice.

On behalf of the respondent it was contended that condemnation by a justice of the article found deposited for the purpose of sale for the food of man and being unfit for the food of man is not a condition precedent to proceedings for the offence dealt with in sub-s. 2 of s. 47 of the Public Health (London) Act, 1891, and that the respondent could on behalf of the company prosecute for the offence without having first procured the condemnation thereof by a justice.

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That portion of the charter granted to the Worshipful Company of Fishmongers of London by King James I. which gave to the wardens and officers thereof the power to enter into places within the city of London and there to search and survey whether fish which is kept be wholesome for man's body and fit to be sold or not and to seize and dispose of any fish found to be unwholesome or corrupt or unfit to be sold was referred to.

The alderman was of opinion that the prosecution had been properly commenced and that it was not necessary as a condition precedent thereto that there should have been any condemnation by a justice of the 600 plaice which formed the subject of the proceedings against the appellant, and he determined that the charge was proved, but dismissed the information in pursuance of s. 1 of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), and ordered the appellant to pay ten guineas as costs.

The question for the opinion of the Court was whether the alderman came to a correct determination in point of law.

J. B. Matthews, for the appellant. Under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, condemnation by a magistrate is a condition precedent to a prosecution for an offence under the sub-section. Sect. 47, sub-s. 1, of the Act of 1891 corresponds with s. 116 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and s. 47, sub-s. 2, of the Act of 1891 to s. 117 of the Act of 1875. In *Vinter* v. *Hind* (1) it was held that under s. 117 of the Act of 1875 it was a condition precedent to a prosecution that the article should be seized on the premises of the person charged, i.e., both seizure and condemnation by a justice were a condition precedent to a prosecution, and the judgments in that case also shew that the seizure and condemnation are different things. Sect. 28 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), was passed in order to abolish the necessity for seizure as a condition precedent to a prosecution, but the necessity for condemnation by a justice was left untouched and still remains: *Salt* v. *Tomlinson*. (2) The object in requiring condemnation is to ensure protection

(1) (1882) 10 Q. B. D. 63. (2) [1911] 2 K. B. 391.

against the acts of a mere executive officer. Unless there is some good reason to the contrary, the provisions in the Public Health (London) Act, 1891, would be expected to run on lines similar to the general legislation contained in the Public Health Acts. Under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, the article would ordinarily be taken to the magistrate to condemn, but as the necessity for seizure is now abolished, the magistrate may be asked to go and condemn it. He might also condemn it merely upon the evidence of the inspector. Sect. 47, sub-s. 2, of the Public Health (London) Act, 1891, exactly reproduces the effect which the Public Health Acts Amendment Act, 1890, had upon the Public Health Act, 1875. The words "so condemned" in s. 47, sub-s. 2, of the Public Health (London) Act, 1891, qualify the seizure and liability to seizure of every animal or article referred to in the section.

Danckwerts, K.C., and *A. H. Bodkin*, for the respondent. The question turns upon the meaning of the words "so condemned" in s. 47, sub-s. 2, of the Public Health (London) Act, 1891. The section did not create a new offence. The object of giving the power of condemnation to a magistrate is to protect a person who destroys the article. The offence was a common law offence, and also a statutory one, as far back as the reigns of Henry III. and Edward I.: *Shillito* v. *Thompson* (1); *Burnby* v. *Bollett*. (2)

The effect of s. 47, sub-ss. 2 and 3, is to reduce the offence to one punishable on summary conviction. An officer of the Company of Fishmongers does not need the protection of condemnation, as he has the power under the company's charter to seize and dispose of any fish found to be unwholesome. The condemnation of the magistrate is not equivalent to a judgment in rem, and the defendant at the hearing can dispute the correctness of the conclusion arrived at by the magistrate that the article was unsound: *Waye* v. *Thompson*. (3) The decision in *Gricell* v. *Malpas* (4) shows that in the present case condemnation is not a condition precedent to a prosecution, although s. 117 of the

(1) (1875) 1 Q. B. D. 12.
(2) (1847) 16 M. & W. 644; S. C. nom. *Burnby* v. *Rollett*, 11 Jur. 827.
(3) (1885) 15 Q. B. D. 342.
(4) [1906] 2 K. B. 32.

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Public Health Act, 1875, as modified by s. 28 of the Public Health Acts Amendment Act, 1890, is not quite the same as s. 47, sub-s. 2, of the Public Health (London) Act, 1891. In s. 47, sub-s. 2, of the Act of 1891 the expression "liable to be seized" means "which as a fact is exposed for sale and is not in a fit condition for human food," and the words "so condemned" are merely introduced as words of identification: per Mathew J. in *Waye* v. *Thompson*. (1) The words "so condemned" are loosely used and are equivalent to "so liable to be condemned." Grammatically the words "so condemned" apply to an article consisting of fruit, &c., and not to an animal or other article. If condemnation is necessary the result will be that persons will, where there has been no condemnation, have to be indicted at common law, and the Court will not be astute to compel that to be done. If the words "so condemned" mean actual condemnation and apply to "every animal or article" the result would be that condemnation would be necessary where a penalty was inflicted, but not necessary where the Court inflicted the heavier punishment of imprisonment without the option of a fine. But a reasonable meaning can be given to the sub-section by reading the words "so condemned" as meaning "so liable to be condemned." In *Giebler* v. *Manning* (2) the words "on behalf of" in s. 47, sub-s. 2, of the Act of 1891 were treated as surplusage.

J. B. Matthews replied.

AVORY J. I am of opinion that the decision of the magistrate was right, and that the appeal should be dismissed.

The contention on the part of the appellant is that it is a condition precedent to a conviction under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, of the person who is charged with exposing for sale or having in his possession for sale an article which is unfit for the food of man, that a justice of the peace shall have condemned the article as being unfit for the food of man within the meaning of that section. The foundation upon which that contention rests is the decision in *Vinter* v. *Hind* (3)

(1) 15 Q. B. D. 342. (2) [1906] 1 K. B. 709.
(3) 10 Q. B. D. 63.

upon the construction of the Public Health Act, 1875, which undoubtedly contemplated, as Stephen J. said in his judgment, three processes, first a seizure, then a condemnation, and then the infliction of a penalty on the person in whose possession the article was found. In that case the Court held that the seizure was a condition precedent to the imposition of a penalty. We are now dealing with a statute in which the language of the Public Health Act, 1875, requiring those processes is expressly varied, and that alteration in language was doubtless made in view of that decision. The words of the Public Health (London) Act, 1891, are "If it appears to a justice that any animal or article which has been seized or is liable to be seized under this section is diseased," &c. It is obvious that the result of that alteration in language is that the decision in *Vinter* v. *Hind* (1) no longer declares the law. It is now sufficient to prove before the magistrate that the article is liable to be seized. It is not necessary to prove that there has in fact been any seizure. There are difficulties in the way of—and for my own part I am unable to find any reason for—holding that a condemnation of the article is a condition precedent to a conviction of the person in whose possession or on whose premises it is found. When the person is summoned he does not need condemnation of the article as a protection to himself; every defence is equally open to him whether there has been a condemnation of the article or not, inasmuch as it has been held—though the contrary at one time was thought by Stephen J. himself in *Vinter* v. *Hind* (1)—that it is open to every person who is summoned with a view to the infliction of the penalty to dispute the unsoundness or diseased condition of the article. Therefore every defence is open to him, and all that it is necessary for the prosecution to prove before the magistrate is that the article is "liable to be seized." Upon that being proved the person to whom it belongs or on whose premises it was found becomes liable under the section either to a fine, or to imprisonment without the option of a fine.

On behalf of the appellant Mr. Matthews has relied upon the words "so condemned" in s. 47, subs. 2, of the Public Health (London) Act, 1891. They are in fact the only words

(1) 10 Q. B. D. 63.

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which are capable of being relied upon in support of his argument, and the question is whether those words so govern the whole operation of the sub-section that no person can be proceeded against for the penalty until there has been a condemnation of the article. It is to be observed that the words "so condemned" occur in the body of the penal section. I am unable to discover any construction of the section which would make them applicable to the alternative punishment of imprisonment without the option of a fine, so that the absurd result would follow from adopting the appellant's contention that a person would be liable to be imprisoned without the option of a fine although there has been no condemnation of the article, but would not be liable to be fined unless there has been a condemnation. I cannot adopt a contention which results in that absurdity. I think the construction suggested by Mr. Danckwerts on behalf of the respondent avoids any apparent difficulty. The words "so condemned" ought in my judgment to be read as meaning "liable to be condemned. If read in that sense all difficulty disappears quite apart from the question whether the words "so condemned" only apply to animals or articles or whether they also apply to an article consisting of fruit, vegetables, &c., in which case a fine of 50*l.* may be imposed for every parcel.

In the result I come to the conclusion that the offence of being in possession of unsound meat or other articles intended for the food of man may be proved without necessarily proving as a condition precedent that those articles have been condemned.

PICKFORD J. I regret to say that I differ from the other members of the Court. I think that the decision of the magistrate was wrong and that s. 47, sub-s. 2, of the Public Health (London) Act, 1891, does require condemnation of the article before a penalty is imposed on the person in whose possession it is found. If I considered myself at liberty to speculate as to the reasons why the requirement of condemnation should be contained in the statute and as to whether as a matter of common sense one ought not to eliminate it I might take a different view and feel able to hold as a matter of common sense that the appellant was rightly convicted; but I do not consider myself at

liberty to speculate why words appear in a statute if I find them there bearing what seems to me to be a plain and obvious meaning. It is therefore necessary to consider the language of the statute in order to see whether it is intended by the statute that a penalty should be imposed without any condemnation of the improper article.

The question turns upon the true construction of s. 47 of the Public Health (London) Act, 1891. Sub-s. 1 gives power to seize any animal or article intended for the food of man which is sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and gives power after seizure to carry it away in order to have it dealt with by a justice. The effect of sub-s. 2 with which we have to deal is, in my judgment, that there must first be the condemnation, and that after the condemnation a penalty may be imposed upon the person to whom the animal or article belonged for every animal or article or for every parcel of any article consisting of fruit, &c., so condemned. I am unable to read the words "so condemned" as confined simply to the parcel of articles mentioned in the second branch of the penal clause. It is absolutely unnecessary for the purpose of protecting the person against whom proceedings are taken against the infliction of a penalty for every potato contained in a sack of potatoes; it would have been quite sufficient for his protection to have used the words "or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof," without using the words "so condemned," which are entirely unnecessary for that purpose. In my opinion the words "so condemned" relate to the "animal" and "article" and the "parcel" also; and they clearly point to condemnation being necessary in the first instance in order to ascertain the penalty. It is true that at the end of the section there follows an alternative punishment for the same offence. The Court may imprison the person convicted; but in my judgment condemnation is still required, and imprisonment is only an alternative for the fine which is to be inflicted after condemnation, and is to be assessed according to the number of articles condemned. That construction does not seem to me to give rise to the absurdity suggested by my brother Avory, namely, that the last part of the section

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giving power to imprison would apply where there has been no condemnation, whereas the penal part would only apply where there has been condemnation. In my judgment one kind of punishment is an alternative to the other, and each applies under the same and under no other circumstances.

That would have been my view as to the construction of this section apart from authority, but it seems to me that the point is absolutely covered by the decision in *Vinter* v. *Hind* (1), and, although the point was not before the Court, to a certain extent also by the decision in *Salt* v. *Tomlinson.* (2) I, however, attach very little importance to *Salt* v. *Tomlinson* (2) because, although I think all the members of the Court said that condemnation and penalty should follow one another, the point was not under consideration, and I do not think the dicta in the judgments in that case are of very great importance. The decision in *Vinter* v. *Hind* (1) turned upon the true construction of s. 117 of the Public Health Act, 1875, which differed from s. 47 of the Public Health (London) Act, 1891, in one respect only, namely, it empowered condemnation of an article and the imposing of a penalty on the person in whose possession it was found only where the article had been previously seized. That defect was remedied, so far as the Public Health Act, 1875, was concerned, by s. 28 of the Public Health Acts Amendment Act, 1890, and the defect was remedied in s. 47, sub-s. 2, of the Public Health (London) Act, 1891, by adding the words "or is liable to be seized." The words "or is liable to be seized" have been interpreted by Cave J. in *Reg.* v. *Dennis* (3), and his interpretation was adopted by the Divisional Court in *Grivell* v. *Malpas* (4) as meaning being in such a condition that there would be justification for seizing it. The language of s. 47, sub-s. 2, of the Public Health (London) Act, 1891, is "if it appears to any justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same and order it to be destroyed . . . ." The section therefore nullifies the decision in *Vinter* v. *Hind* (1) to the extent that seizure is not required as a condition precedent to a

(1) 10 Q. B. D. 63.
(2) [1911] 2 K. B. 391.
(3) [1894] 2 Q. B. 458.
(4) [1906] 2 K. B. 32.

conviction. But apart from that it leaves the reasoning in *Vinter* v. *Hind* (1) untouched.

Now it is clear that in *Vinter* v. *Hind* (1) the Court construed the words "so condemned" in s. 117 of the Public Health Act, 1875, exactly in the same way as I think they must be construed in s. 47, sub-s. 2, of the Public Health (London) Act, 1891. The sections are so similar that in my opinion no distinction can be drawn between them. Field J. said: "Looking back, we find the justice shall condemn 'the same' and that 'the same' is, amongst other things, any meat 'so seized.' It might have been argued even then that the construction was in favour of the appellant; but the penalty clause prescribes a penalty for every piece of meat 'so condemned.'" A piece of meat stands on the same footing in s. 117 of the Public Health Act, 1875, as the animal or article in s. 47, sub-s. 2, of the Public Health (London) Act, 1891, and Field J. undoubtedly held that the words "so condemned" governed the whole of the penal clause, as in my opinion they govern the whole of the penal clause in the present case. Then Stephen J., dealing with the contention in that case that the portion of s. 117 of the Public Health Act, 1875, imposing a penalty might be taken as separate from the portion of the section authorizing condemnation, said—and the reasoning to my mind is quite unanswerable—after reading s. 117: "Such is the provision shortly read. Those words taken together describe one process. First, there is to be a seizure of meat exposed for sale, then condemnation by a justice of the meat so seized, and then the person in whose possession it was seized, or whose property it is, will be liable to a penalty of 20*l.* for every piece of meat so seized." The only difference between the section then under consideration and the section now before us is that seizure is no longer required, and it is sufficient if the meat is in a condition which makes it liable to seizure. Stephen J. continues: "It is evident that those three matters form one consecutive process, and if the conditions are not fulfilled the third consequence does not follow. One good test for the interpretation of an enactment of this kind is to think of what words would have been used to

(1) 10 Q. B. D. 63.

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convey the meaning which, for the purposes of argument, is sought to be extracted from those actually used. If it had been intended to make mere exposure of meat for sale an offence subjecting the offender to a penalty, the means by which this would have been done would surely have been to throw s. 116 and the first part of s. 117 together, and to make a new section of the latter part so as to run, 'Any person who exposes for sale any meat unfit for human food shall be liable to a penalty of 20*l*.'" Substituting for "s. 116 and the first part of s. 117" the words "sub-s. 1 and the first part of sub-s. 2," that passage seems to me to be exactly applicable to the enactment we have to consider. Stephen J. continues: "That is what we are asked to find as the meaning of the latter part of the section, and I should have been glad to do so. But to arrive at such a result it would have been necessary to take extraordinary liberties with the Act and to leave out all the words of reference and much alter the legislation." It seems to me that is exactly what we should do in the present case if we read the latter part of the sub-section which imposes the penalty as not following and being consequent upon the former part which requires condemnation.

In my opinion, therefore, both upon the construction of the sub-section and upon authority—which it seems to me is not touched by the alteration of the words and the insertion of "is liable to be seized"—the condemnation is necessary before the imposition of the penalty, and if the words "so condemned" be read, as I think they should, and as the Court in *Vinter* v. *Hind* (1) thought they should, in the similar section contained in the Public Health Act, 1875, as applying to the words which conclude with "every animal or article" as well as to every "parcel thereof," it seems to me that there must be condemnation before conviction, otherwise there is no means of assessing the amount of the penalty. It seems to me that the power to order imprisonment given by the last words of the sub-section is an alternative to the power to inflict a fine and is not a power to order imprisonment without previous condemnation having taken place.

It is said that there are difficulties in so reading the sub-section and that there is no reason why this legislation should have

(1) 10 Q. B. D. 63.

proceeded on these lines. As I have already said, I do not consider myself at liberty where the words are clear to consider the reason why legislation proceeds on particular lines if in fact it does so proceed. There does not seem to me to be any great difficulty in this construction. It is not necessary that the goods should be seized because they are to be condemned if they are "liable to be seized," that is to say, unfit for food. I can see no objection to their being condemned without being brought into Court. They may be condemned on evidence, and in the present case if the magistrate had been asked to make an order of condemnation he would have done so on the evidence of the inspector.

It seems to me that in this case the prosecution took an irregular line. An order of condemnation and for a penalty if it had been asked for by the prosecution would have been obtained just as easily as an order for a penalty only. If one were at liberty to pay attention to the argument of inconvenience, it appears to me that there would be no serious inconvenience caused in this case by construing the sub-section in the manner in which I think it ought to be construed; but in any event I think the actual words in the sub-section and the meaning of those words must be given effect to; and looking at the words of the sub-section and giving effect to what is I think the proper construction, I come to the conclusion that the infliction of a penalty can only follow condemnation, and that therefore the magistrate was wrong.

Lord Alverstone C.J. I think this appeal should be dismissed, and out of respect to my brother Pickford I wish to add a few words without repeating what has fallen from my brother Avory, except so far as is necessary to make my meaning clear.

I very much doubt whether much assistance is to be gained in dealing with this case by a consideration of the provisions of the Public Health Act, 1875, except in so far as it may be said that the reasoning my brother Pickford has applied ought to be adopted in construing s. 47, sub-s. 2, of the Public Health (London) Act, 1891. The question we have to decide depends solely upon the true construction of the language contained in s. 47, sub-s. 2, of the Public Health (London) Act, 1891. In

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construing that sub-section it should be observed that there is a substantial difference between its language and that of s. 117 of the Act of 1875, and in my opinion the difference is fundamental to the decision of the point before us. In sub-s. 2 of s. 47 of the Act of 1891 the language is "has been seized or is liable to be seized under this section." It seems to me that it cannot be seriously disputed that a person can be charged under sub-s. 2 of s. 47 if it is proved that he has an animal or article which at the time it is exposed for sale is in such a condition as to be liable to be seized or condemned without its having been actually seized or condemned. It seems to me that under the earlier words in the sub-section the offence is exposing for sale an animal or article in that condition. It seems to me that was made clear in *Grivell* v. *Malpas* (1) in my judgment and particularly in that of my brother Channell when he referred to proceedings taken under sub-s. 3.

It is not disputed that the offence of exposing for sale articles of food unfit for human consumption was an offence before the enactment contained in s. 47 of the Public Health (London) Act, 1891. The decisions in *Shillito* v. *Thompson* (2) and *Burnby* v. *Bollett* (3) are quite conclusive. It was a statutory and a common law offence. All that the Public Health (London) Act, 1891, did was to render such a charge cognizable by Courts of summary jurisdiction and under simplified provisions having regard to the earlier similar provisions in the Public Health Act, 1875. It must be remembered that seizure is no longer necessary, and the former provision that seizure was necessary before condemnation was rather anomalous. If seizure is no longer necessary, it is strange that condemnation should be necessary in the manner that my brother Pickford suggests, namely, by asking the magistrate who is asked to fine or to punish for the offence also to condemn. I cannot see why it should be necessary for that step to be taken. The difficulty with which we have to deal is that under sub-s. 2 of s. 47 of the Act of 1891, though it is quite true that an article liable to be seized may be condemned, and that a person exposing the article for sale is

(1) [1906] 2 K. B. 32. (2) 1 Q. B. D. 12.
(3) 16 M. & W. 644.

liable to be fined, yet it is suggested that—and I quite appreciate the difficulty—because the fine is to be calculated on "every parcel so condemned" and the fine may have to be calculated in the case of articles other than vegetables, &c. I am not altogether satisfied that the words "so condemned" do not apply to all articles—unless the calculation can be made by reference to the number of parcels, animals, or, say, legs of mutton, the amount of the fine cannot be fixed. I am not satisfied with the argument my brother Pickford has used as to the fine and imprisonment without the option of a fine being merely alternative punishments. It seems to me that in a serious case the prosecution would be perfectly entitled to ask that the defendant should be imprisoned even where there had not been a condemnation, if it were true that he had exposed for sale the article in such a condition that it was unfit for human food. In my judgment that construction of sub-s. 2 of s. 47 of the Act of 1891 is confirmed by sub-s. 3 of that section, in which the words "liable to be seized and condemned" are used. I am unable to discover any reason why there should be a difference in the operation of the two sub-sections with regard to the question whether it is necessary that there should be actual condemnation or only liability to condemnation. I do not think it is possible to successfully contend having regard to the decision in *Orwell* v. *Malpas* (1) that under sub-s. 3 of s. 47 of the Act of 1891 there cannot be a conviction without previous condemnation under the words "where it is shown that any article liable to be seized"—if it is liable to be seized it is also liable to be condemned—"under this section and found in the possession of any person was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned . . . ."—the words are not "had been" seized and condemned, but "liable to be"—"the person who so sold the same shall be liable to" fine and imprisonment. It is quite true that in *Orwell* v. *Malpas* (1) and in *Salt* v. *Tomlinson* (2) there had in fact been condemnation. But it seems to me that, having regard to the judgment of my brother Channell in *Orwell* v.

(1) [1906] 2 K. B. 32. (2) [1911] 2 K. B. 391.

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Malpas (1), in which he dealt with sub-s. 3 of s. 47 of the Act of 1891, there must have been a conviction in that case even though there had been no condemnation.

In my opinion the words "so condemned" in sub-s. 2 of s. 47 of the Public Health (London) Act, 1891, mean that the article is in a condition in which it could be seized and condemned. If seizure is no longer necessary in order to justify a conviction, I cannot see why formally asking a magistrate to condemn should be necessary. These statutes were enacted in the public interest and ought to be construed in such a manner as to carry out the intention of the Legislature to protect the public as far as possible.

As to *Vinter* v. *Hind* (2), although I feel the force of what my brother Pickford has said, I desire to point out that there are some passages in the judgment of Stephen J. in that case which are not now law, and I am not much pressed by his criticism of the mode of interpretation which he condemns. At the end of his judgment he says: "A further observation is, that suppose there had been a regular seizure under s. 116 and a regular condemnation by a justice under s. 117, and that then the person to whom the meat belonged had been summoned before the justices, could he have been heard to say on that summons that the meat was not in fact unsound? It appears to us that he could not, for the discretion of the justice on that is to be taken to be conclusive, and if the person summoned could only dispute the seizure or exposure for sale and could not dispute the unsoundness, that is a strong ground to support our construction of the Act." It is quite plain that that passage is not a declaration of the present law, and that he could dispute that the article was unfit for food at the time he sold it, and in fact in the present case the appellant endeavoured to convince the magistrate that the fish was not unfit for food at the time it was exposed for sale. I cannot construe the Public Health (London) Act, 1891, as making it a condition precedent to proceedings that there shall have been seizure (which is not disputed) or that there shall have been condemnation which follows seizure. It seems to me that if it be shewn that the defendant has a putrid article upon his

(1) [1906] 2 K. B. 32. (2) 10 Q. B. D. 63.

stall and is offering it for sale proceedings can be taken. I recognize the difficulty of the case and express my opinion with great diffidence because my brother Pickford has given a reasoned judgment coming to another conclusion, but I am not able to come to the conclusion that condemnation is a condition precedent to conviction under this statute, and I therefore think the appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Wilson & Son.*
Solicitor for respondent: *Herbert Muskett.*

J. E. A.

SCOTTISH SHIRE LINE, LIMITED, and Others *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED.

1917
May 1.

Marine Insurance—"Freight chartered or as if chartered"—Contract to supply Cargo—Loss of Freight—Time Penalty Clause—Special Charter Cancelling Date—Non-disclosure—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 18.

The plaintiffs, three shipowning companies, ran in combination a line of steamers between the United Kingdom and Australia, advertising the dates when the various steamers were expected to arrive at the various Australian ports. The steamers were not chartered, but the plaintiffs' shipping agents, who had control of large quantities of refrigerated and other cargo in Australia, made contracts with the plaintiffs to load such cargo on their steamers.

By one of these contracts Messrs. B. & Co. of Sydney agreed that all refrigerated cargo owned or controlled by them should, so far as there was available space, be shipped on the plaintiffs' steamers.

By another contract the plaintiffs agreed with Messrs. J. & Co. of Hobart to have one of their steamers, the *Ayrshire*, at Hobart on or about March 20, 1910, ready to load 40,000 cases of apples.

The plaintiffs effected with the defendants a policy of insurance "upon freight of frozen meat [illegible] apples [illegible] other refrigerated produce valued at 15,000*l.* Chartered or as if chartered . . . . Clauses as attached. Of the ship or the vessel called *Ayrshire* . . . . at and from any ports or places . . . . in the United Kingdom to any ports or places . . . . in Australia and/or Tasmania . . . ." The risks included perils of the sea.

The policy contained a time penalty clause as follows: "Warranted

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free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date."

The apple season at Hobart is confined to the months of March and April. The fact that by the contract with J. & Co. the plaintiffs had agreed to have the *Ayrshire* at Hobart on or about March 20, 1910, was not known to the defendants.

The *Ayrshire* started on her advertised voyage outward on January 1, 1910. On January 2 she met with a peril of the sea and was incapacitated from continuing the voyage. The greater part of the cargo which the *Ayrshire* would have loaded was taken by the steamer next in order on the advertised list, the rest being taken by another vessel in which the plaintiffs were interested. On March 17 the *Ayrshire* set sail and reached Australian waters early in June, when she loaded and earned freight upon a full cargo. The plaintiffs lost the amount of freight which could have been earned by one extra homeward sailing.

As to the contracts with B. & Co. and J. & Co.:—

Held, that the effect of each of these contracts was to give the plaintiffs an insurable interest in "freight as if chartered" within the meaning of the policy.

As to B. & Co.'s contract:—

Held, following *Everth* v. *Smith* (1814) 2 M. & S. 278, that there was no loss of this freight.

As to J. & Co.'s contract:—

Held, (1.) that there was a loss of the freight;

(2.) that this contract was not a special charter containing a cancelling date within the meaning of the policy; but

(3.) that there was non-disclosure of a material circumstance within the meaning of s. 18 of the Marine Insurance Act, 1906, in that the defendants were not informed that the *Ayrshire* was due to arrive at Hobart on or about March 20, 1910; and

(4.) that this non-disclosure avoided the policy.

TRIAL of action before Hamilton J. without a jury.

The action was brought on a policy of marine insurance. The Scottish Shire Line, Limited, were the original plaintiffs. Subsequently by an order in chambers the Federal Steam Navigation Company, Limited, and Houlder Brothers & Co., Limited, were added as plaintiffs.

The three plaintiff companies ran one line of steamships called the F. H. S. Line between the United Kingdom and Australia. The line was managed by a committee in London and a committee in Sydney who settled and published from time to time a list of sailings of the various steamers running in the line. A round voyage was arranged for each steamer outward from

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and homeward to this country with dates for leaving Brisbane, Sydney, Melbourne, Hobart, and Adelaide. The business of the line was described as "a berth business" with running contracts for cargoes of various kinds and other contracts as occasion might arise made at short notice by the agents of the line at the various Australian ports. The steamers were not chartered. They were maintained and insured at the expense of their respective owners. Freight and disbursements on the joint account at risk during the voyages of the line were insured at the joint expense. The same applied to "freights chartered or as if chartered," and notice of the same with values on being opened were given in writing to the committee. For the covering of the several freights, chartered freights, and disbursements as above the several owners were responsible to the combination of owners jointly.

The agents of the F. H. S. Line were, among others at Brisbane and Sydney, Messrs. Birt & Co., Limited, and at Hobart, Messrs. H. Jones & Co., Limited.

Messrs. Birt & Co., of Sydney, besides being agents for the F. H. S. Line at Sydney, were also proprietors of refrigerating works. They made arrangements with exporters of frozen meat, and an agreement existed between Birt & Co. and the plaintiffs that all refrigerated cargo owned or controlled by Birt & Co. and intended for shipment to the United Kingdom should, so far as there was available space, be shipped by the F. H. S. Line.

By an agreement dated March 27, 1908, and made between Foley Brothers, Limited, of Brisbane, thereinafter called the shipper, of the one part, and the F. H. S. Line of the other part the shipper agreed to ship by the steamers of the F. H. S. Line all butter consigned to the United Kingdom belonging to the shipper or in which he was interested or over which he had any control; but nothing was to prevent the shipper from shipping by any other line running according to a regular time table and carrying butter on the same conditions as and at rates of freight not less than those specified in the contract. The F. H. S. Line agreed to find space for the butter of the shipper as required and to give preference to butter over other refrigerated cargo to the

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extent of the insulated space reserved in the steamers for Queensland. The shipper with regard to each contemplated shipment agreed to give five days' notice before the departure from Brisbane of the steamer in which the space was required, and to be liable to pay any loss of freight on space reserved for the shipper if unfilled. Freight was payable at the port of shipment in exchange for bills of lading.

Other contracts in similar form were made between the F. H. S. Line, the Berrima District Farm and Dairy Company, Limited, of New South Wales, the Government Produce Export Department of South Australia, and the Apollo Bay Dairy Company, Limited, of Victoria.

By an agreement dated October 14, 1909, and made between the Federal Steam Navigation Company, Limited, therein called the owners, as agents for the F. H. S. Line of the one part, and H. Jones & Co., Limited, and W. D. Peacock & Co., of Hobart in the State of Tasmania, therein called the companies, of the other part, the owners agreed, subject to loss, detention, or force majeure, to have the steamship *Ayrshire* at Hobart on or about March 20, 1910, with a reserve space in the insulated holds ready to start loading 40,000 cases of apples which the companies agreed to supply to the ship within two days from the ship's arrival in Hobart, and notification being given to the companies of her being ready to load, and that being so loaded the ship should proceed via Suez Canal with all convenient speed, reserving, however, to the owners the right of calling for loading at any Victorian $\frac{\text{and}}{\text{or}}$ South Australian $\frac{\text{and}}{\text{or}}$ Mediterranean ports and for bunkering at any other ports en route to London and Liverpool and there discharge. The owners agreed to use every endeavour to make the voyage as near as possible about fifty to fifty-three days from leaving Hobart and reaching London. The space reserved in the steamer was to be used by the companies for the conveyance of apples, but should they be unable to obtain the same at ordinary rates, then they had the option to utilize the space by loading other cargo. Freight was to be paid by the companies at a rate mentioned. If other cargo than apples were loaded the space so occupied was to be paid for at the same rate by measurement as would have been payable if

the space had been filled by cases of apples. The companies undertook that the space reserved should be filled with apples or other cargo shipped by the companies and that the freight to be paid would be paid upon shipment. In the event of the companies failing to ship they agreed to pay the freight when called upon and also freight for all space reserved but not filled less the cost of loading and discharging on short shipments. The owners undertook not to carry any fruit for any shipper from Hobart other than the companies or their nominees for the fruit season 1910. They agreed to allow the companies two working days if necessary to load at Hobart: demurrage was to be paid as provided by two bills of lading which were to form part of the agreement. The owners recognized that by reason of gales, flood, thunderstorms, fires, diseases, or any act of God it might be impossible for the companies to fulfil their engagements and it was agreed that such failure should not be deemed a breach of the agreement, but should excuse the owners from sending steamers to Hobart at the time appointed by the agreement.

The bills of lading mentioned above contained each a clause enabling the shipowners or charterers to tranship the goods either before the commencement of or during the voyage, and to carry the goods to their port of destination by other steamers or ships proceeding by any route directly or indirectly at the shipowners' or charterers' expense but at the risk of the owner of the goods.

The *Ayrshire*, owned by the Scottish Shire Line, was one of the steamers running in the F. H. S. Line. Her homeward sailing dates according to the time table of the line were for the year 1910: Brisbane, March 8; Sydney, March 14; Melbourne, March 19; Hobart, March 25; Adelaide, April 3.

By a policy of insurance dated January 7, 1910, made in pursuance of slips opened on December 2 and closed on December 30, 1909, Messrs. Turnbull, Martin & Co. on behalf of the Scottish Shire Line insured the freight of the *Ayrshire* with the defendants in these terms: "2000*l*. In consideration, &c., the said company" (*i.e.* the defendants) "shall be subject and liable to pay and make good all such losses and damages hereinafter

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expressed as may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of 2000*l.* hereby insured which insurance is hereby declared to be upon freight of frozen meat $\frac{\text{and}}{\text{or}}$ apples $\frac{\text{and}}{\text{or}}$ other refrigerated produce and valued at 15,000*l.* Chartered or as if chartered. On board or not on board. Clauses as attached. Of the ship or the vessel called *Ayrshire* (S) . . . . lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia $\frac{\text{and}}{\text{or}}$ Tasmania via Durban $\frac{\text{and}}{\text{or}}$ any route whatsoever." The risks included perils of the sea and other usual perils including all damages and accidents attendant on and all risks incidental to steam navigation. Attached to the policy was a clause in these terms :—" Risk to commence at once and continue in its entirety until steamer sails from final port on homeward voyage. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date. It is specially agreed that in the event of a total loss being recoverable under this policy the underwriters shall be entitled to receive by way of salvage the net amount of meat freight earned and actually payable to the owners at the time of the accident."

The apple season at Hobart is confined to the months of March and April. The fact that by the contract of October 14, 1909, the plaintiffs had agreed to have the *Ayrshire* at Hobart on or about March 20, 1910, was not known to the defendants.

On January 1, 1910, the *Ayrshire* sailed from Liverpool on her outward voyage. On January 2 she came into collision with another vessel in St. George's Channel, and being seriously damaged she had to put back to Holyhead for repairs. Notice of abandonment was given to the defendants and was refused by them. The *Ayrshire* proceeded to Liverpool, where she was finally repaired. The work of repairing occupied two months and cost about 21,000*l.* On March 17 the vessel loaded a cargo and set sail, reaching Australian waters some three months later than she was expected.

At the end of December, 1909, Messrs. Jones & Co. of Hobart

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had, with the assent of the committee of the F. H. S. Line, arranged that when the *Ayrshire* called at Hobart on or about March 20, 1910, according to the contract of October 14, 1909, there should be ready for loading a cargo of from 50,000 to 70,000 cases of apples. Apart from this the vessel had no fixed engagement. When she became disabled through the collision, the committee were obliged to take steps to find some other vessel to replace her.

In the time table of the F. H. S. Line the *Ayrshire* was preceded by the *Somerset*, whose sailing dates on her homeward voyage were just one month earlier than those of the *Ayrshire*. In the ordinary course, therefore, the *Somerset* would have left Hobart at the end of February. It was finally arranged that the *Somerset* should postpone her homeward journey from Hobart so as to take on board the apples destined for the *Ayrshire*, and in pursuance of this arrangement the *Somerset* in fact sailed from Hobart on March 22 a full ship, having taken on board 66,801 cases, being some 5,000 cases less than could have been offered to and taken by the *Ayrshire*, and also a quantity of frozen meat which the *Ayrshire* would have taken if she had kept her dates. Other cargo, consisting of frozen meat from Brisbane and apples from Melbourne, which would have been available for the *Ayrshire*, was taken by the *Carpentaria*, a vessel belonging to the British India Steam Navigation Company, running upon another route in which, however, the plaintiffs were interested. The subsequent sailings of the F. H. S. Line were rearranged so that when the *Ayrshire* eventually reached Australian waters a place was found for her in the sequence of sailings and she loaded and earned freight upon a complete cargo.

The plaintiffs contended that as the result of the collision and the consequent inability of the *Ayrshire* to keep her advertised dates the whole of the line became disorganized and its carrying capacity became reduced by the cargo-carrying capacity of the *Ayrshire*, and that therefore the line had lost the freight which she would have earned for her full capacity.

The learned judge found as a fact that if no accident had happened to the *Ayrshire* she would have sailed with a full cargo at full rates; that the *Somerset* if undisturbed would also have

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sailed with a full cargo at full rates; that the steamers subsequent to the *Ayrshire* would equally have been able to get all the cargo they could carry; and that the plaintiffs lost that amount of freight for refrigerated cargo which could have been earned upon one extra homeward sailing.

Bailhache, K.C., and *Leck*, for the plaintiffs. The freight which the *Ayrshire* would have earned if she had kept her appointed date has been lost to the plaintiffs. The question is whether that loss was covered by the policy of January 7, 1910, which was an insurance "upon freight of frozen meat $\frac{\text{and}}{\text{or}}$ apples $\frac{\text{and}}{\text{or}}$ other refrigerated produce . . . . chartered or as if chartered . . . . of the ship or vessel called *Ayrshire* . . . ." In other words the question is whether the freight which the ship would have earned by carrying the cargo which the agents in Australia had contracted to supply was "freight chartered or as if chartered" within the meaning of the policy.

The words "freight chartered or as if chartered" mean freight to be earned under a charterparty or some other binding contract: *Barber* v. *Fleming* (1); *Williams & Co.* v. *Canton Insurance Office*. (2) They may even cover a reasonable expectation of freight where there is no binding contract to supply cargo: see Carver, Q.C., arguendo in *Turnbull, Martin & Co.* v. *Hull Underwriters' Association* (3) and the arguments of counsel in *Manchester Liners* v. *British and Foreign Insurance Co.* (4) Gow on Marine Insurance, p. 233, is to the same effect.

First, as to Birt & Co.'s contract for refrigerated cargo, those agents were under promise to send all their refrigerated cargo by the plaintiffs' ships. When a ship started on her outward voyage the right to earn freight commenced. If such a ship is prevented by perils of the sea from carrying out the adventure, there is a loss of "freight as if chartered" within the meaning of this policy. There was no freight to which the policy is applicable except freight to be earned under these contracts. By s. 3, sub-s. 1, of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), every lawful marine adventure may be the subject of a

(1) (1869) L. R. 5 Q. B. 59.
(2) [1901] A. C. 462.
(3) [1900] 2 Q. B. 402.
(4) (1901) 7 Com. Cas. 26, at p. 30.

contract of marine insurance: and by s. 26, sub-s. 3, where a policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered. Here the parties were dealing with the insurance of freight to be earned by a vessel running as one of a line. Owners and underwriters knew that if she failed to keep her appointed date there would be a loss of freight. If the vessel arrived in time there would be a cargo wherewith to load her. The freight she would earn on that cargo is freight "as if chartered." If she did not arrive in time another ship would take that cargo, and the freight earned by the second ship would be lost to the first ship. That is the freight which was insured in this policy.

Secondly, as to Jones & Co.'s contract relating to the Hobart apples, the freight to be earned on this contract was clearly freight as if chartered: the agents had expressly agreed to load a particular cargo upon a particular ship.

Leslie Scott, K.C., and *Mackinnon*, for the defendants. The plaintiffs are seeking through the medium of an insurance on freight to make the defendants pay them 15,000*l.* for the inconvenience which they as owners have suffered in having to rearrange the sailings of their line of steamers. This is an insurance on freight. It is not an insurance on profits, nor on the interest which the plaintiffs have in preserving the sequence of the sailings, nor on the expectation of freight provided that sequence is preserved. Freight is not an appropriate word to describe any of those interests. A policy on freight on a particular voyage does not attach until the goods are on board or there is a contract to load a particular vessel. It may be admitted that in the case of the Hobart apples there was such a contract. As to that contract other considerations apply. In the case of the other cargo there was nothing more than an expectation that freight would be earned if a vessel presented herself for loading.

[Bankes J. As to the butter contracts the *Ayrshire* was never more than a seeking ship.]

The same applies to Burt & Co.'s contract. There was no contract to have a cargo ready. "Freight chartered or as if

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chartered " must mean something more than a mere expectation of freight: *Flint* v. *Flemyng* (1); Phillips on Insurance, ch. iii., s. xi., sub-ss. 328, 329, 331; Arnould on Marine Insurance, 8th ed. (1909), ss. 266, 269. There must be a definite contract under which the shipowner will earn freight unless he is prevented by the perils insured against. Here, except as to the Hobart apples, there was no definite contract to supply cargo, nor anything more than a mere expectation that cargo would be available if and when a vessel arrived. A mere expectation is not an insurable interest.

Secondly, assuming that there was a definite contractual obligation to supply cargo, it was not an obligation to supply cargo for any particular ship. It was a general contract to supply cargo for the ships of the line. If the freight to be earned from such contracts could be called "freight as if chartered," there was no loss of that freight. The cargo intended for one ship was carried by another of the line.

Thirdly, the insurance was on freight to be earned by the *Ayrshire*, and that freight was not lost because she in fact loaded a cargo and earned freight: *Everth* v. *Smith*. (2)

Fourthly, if the freight was lost which she would have earned if she had kept her appointed date, that freight which she subsequently earned must have been abandoned to the underwriters: *Sharp* v. *Gladstone*. (3)

Then as to Jones & Co.'s apple contract, this policy contained a special time penalty clause in these terms: " warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise," but the clause was only to apply " in cases where the vessel is fulfilling a special charter containing a cancelling date." This contract was a special charter containing a cancelling date within the meaning of this clause. If the ship was not at Hobart on or about March 20, 1910, the shippers could refuse to load, which is practically to cancel the charter.

Furthermore, the defendants were not notified of the material fact that the ship was to be at Hobart on or about March 20,

(1) (1830) 1 B. & Ad. 45. (2) 2 M. & S. 278.
(3) (1805) 7 East, 24.

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1910, and therefore the whole policy is void for non-disclosure. The apple season being March and April, the risk of the underwriters was greatly increased if the ship was to be in her berth on or about March 20 or lose her cargo. By s. 18, sub-s. 1, of the Marine Insurance Act, 1906, the assured must disclose to the insurer every material circumstance which is known to the assured. By sub-s. 2 every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

Bailhache, K.C., in reply. As to the butter and meat contracts, the argument that the *Ayrshire* subsequently loaded a cargo and earned freight and that therefore there was no loss was the argument advanced unsuccessfully in *The Bedouin*. (1) The *Ayrshire* lost her freight on her appointed voyage and that loss was never recovered.

Then as to the Hobart apples, claims consequent on loss of time are not excluded unless the vessel is fulfilling a special charter containing a cancelling date. The *Ayrshire* was not fulfilling a charter special or otherwise, and the contract which she was fulfilling did not contain a cancelling date: *Love & Stephenson and Newcastle Steamship Freight Insurance Association*. (2) The effect of a cancelling date is that in certain events the parties may put an end to the terms of the contract. If they do, there is no loss of freight by perils of the sea, but by the act of the parties: *Inman Steamship Co.* v. *Bischoff* (3); *Mercantile Steamship Co.* v. *Tyser*. (4) The loss here was a loss of freight consequent on loss of time: *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (5); *Turnbull, Martin & Co.* v. *Hull Underwriters' Association*. (6) It was not within the exemption, and therefore, apart from concealment, the defendants are liable.

As to concealment, by s. 18, sub-s. 3, of the Marine Insurance Act, 1906, the insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know.

(1) [1894] P. 1.
(2) [1895] 2 Q. B. 90.
(3) (1882) 7 App. Cas. 670.
(4) (1881) 7 Q. B. D. 73.
(5) [1897] A. C. 609.
(6) [1900] 2 Q. B. 402.

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HAMILTON J. The plaintiffs having lost the amount of freight which would have been earned on one additional homeward sailing, the question is whether they are insured against that loss by the policy sued upon. The insurance is upon "freight of frozen meat $\frac{\text{and}}{\text{or}}$ apples $\frac{\text{and}}{\text{or}}$ other refrigerated produce and valued at 15,000*l*. Chartered or as if chartered."

The words "chartered or as if chartered" have given rise to much discussion. I do not know when those words first came into use. Similar words, namely, "freight chartered or otherwise," were used in the year 1869 in the case of *Barber* v. *Fleming* (1), in which the language of Blackburn and Hannen JJ. is strong to shew that they regarded them as meaning freight, the subject-matter of some binding contract. The point being whether the ship had so started on her voyage as to begin earning that freight, Blackburn J. said (2): "The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to shew it is so (*sic*) no longer speculative, but he had actually begun to do something which makes the inchoate interest attach, and makes it a real thing." Hannen J. said (3): "The policy may or may not apply to freight which might have been earned on the way from Bombay to Howland's Island. It may or may not apply to freight other than the chartered freight: but this particular freight is specified under the terms of the policy, inasmuch as it is chartered freight from Howland's Island to the United Kingdom." From the date of that case until the present time the words have been in common use. The next case to which I have been referred where such words were discussed was *Turnbull, Martin & Co.* v. *Hull Underwriters' Association*. (4) The words there were "upon freight of frozen meat chartered or as if chartered." It was argued by Mr. Carver, Q.C., afterwards his Honour Judge Carver, that "the phrase 'chartered or as if chartered' means 'contracted for or as if contracted for,' the clause being a wide one and intended to cover even an expectation of freight." It is important to observe that he was referring to a case in which

(1) L. R. 5 Q. B. 59.
(2) L. R. 5 Q. B. at p. 73.
(3) L. R. 5 Q. B. at p. 74.
(4) [1900] 2 Q. B. 402.

there were contracts or engagements of some binding kind, because Mathew J. in his judgment (1) says: "The evidence shewed that at the time when the vessel sailed no contracts had been secured by the plaintiffs for the shipment of frozen meat from the Colonial ports, but such contracts were made and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports while the vessel was making her outward voyage." The accident occurred at Sydney. The result, therefore, was that at the material date, namely, the date of the accident, there were contracts made and the homeward cargo booked; and the argument that "chartered or as if chartered" means "contracted for or as if contracted for" was advanced in a case in which there were actual contracts at the material date. It may well be that the phrase includes freights in expectation at the date of the insurance, but not freights which are still in expectation at the time of the loss. The words "contracted for or as if contracted for" cannot mean "contracted for or not contracted for." If freight is "as if contracted for," it must be the subject of some legal obligation, although it may not be in the form of an ordinary mercantile contract. But "as if contracted for" implies the idea of a contract, and negatives the idea that there is no contract.

The next case is *Williams & Co.* v. *Canton Insurance Office*, (2) In that case there was a policy upon freight "chartered or as if chartered." Dealing with those words the Earl of Halsbury L.C. said (3): "These words 'or as if chartered' have to my mind no meaning where there is, as in this case, a chartered freight, and if they have any meaning at all in other cases, of which I have some doubt, I decline to speculate what their meaning would be in a case different from the present." In the present case, ut res magis valeat quam pereat, I have to fit some kind of meaning on to those words. Lord Brampton in his judgment (4) said: "I am very much disposed to think that in using in the policy the words 'freight chartered or as if chartered,' it was intended by the framers of and the parties to it that, whatever the facts might be, whether the ship was wholly loaded by the

(1) [1900] 2 Q. B. at p. 404.
(2) [1901] A. C. 462.
(3) [1901] A. C. at p. 466.
(4) [1901] A. C. at p. 471.

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charterers or wholly or partly under bills of lading by other shippers, the whole was to be treated for the purposes of the policy as one entire undivided cargo, loaded by the charterers, to be carried for that one lump freight." Lord Lindley said (1): "The alternative 'or as if chartered,' applies to freight, or what in business is treated as freight, although not made payable by the express terms of any charterparty—e.g., if the shipowner carries other people's goods without a charterparty, or perhaps if he carries his own goods. The phrase 'as if chartered' would also cover freight payable under a charterparty entered into after the date of the policy, if the policy without those words would not extend to such freight."

Those passages give no colour to the view that the words "as if chartered" mean "not contracted for but reasonably expected at the date of the loss." As Lord Lindley says, they cover the case of a charterparty expected at the date of the policy but only executed after that date; they cover, or may cover, the benefit that the shipowner derives from carrying his own goods, although it has been held that the word "freight" itself is enough to describe this benefit; and they cover the case of other people's goods being carried without a charterparty—that is to say, either under a bill of lading, or, if there is no actual bill of lading, under that promise to pay which is implied from the fact that the goods are shipped and carried.

The argument of counsel in *Manchester Liners* v. *British and Foreign Insurance Co.* (2) does not involve any statement that in practice the words "as if chartered" point to insurance of freight not actually contracted for at the date of the loss. The plaintiffs must establish that the words include freight under contracts anticipated but not in existence at the date of the loss. The only authority for so extending the words is the handbook of Mr. Gow on Marine Insurance at p. 233, where he says that by those words "the underwriter insures a sum on freight whether the vessel is under engagement or not, carrying cargo or not, and whether the cargo has already paid freight or not." I have no evidence of any usage attaching that meaning to the words. I must give them their ordinary meaning. They

(1) [1901] A. C. at p. 475. (2) 7 Com. Cas. 26, at p. 30.

qualify and describe freight: not all freight, but freight as known to the law and freight which can be said to be chartered or as if chartered. There is no difficulty in understanding what is meant by chartered freight. It is contrasted with bill of lading freight. Chartered freight is remuneration paid to the shipowner by another who hires his ship or part of it, generally with an added contract that the shipowner's captain shall sign bills of lading for the charterer's benefit. On the other hand, bill of lading freight is prima facie the shipowner's own contracted remuneration for the carriage of goods in his own ship by his own servants. No doubt the word freight extends to other engagements which are binding although they do not take the form of either a charter or a bill of lading, such as berth notes. Vessels are often loaded on the berth, a middleman undertaking with the shipowner either to ship cargo or to procure cargo to be shipped. In these cases the shipowner has the right to receive cargo and to earn freight for its carriage: and as soon as in pursuance of such a contract his ship starts on the contracted voyage he has commenced to earn that remuneration, whether it be called freight, or chartered freight, or freight as if chartered. It has often been said that freight involves the possession of goods implying a contract to carry or a legal right to have goods for carriage with a view to earning freight. But I cannot find that the words freight, or chartered freight, or freight as if chartered have ever been applied to the expectation, however well founded, that a ship's agents will procure a cargo for her where there is no actual binding engagement to that effect. Indeed the contrary has been decided in the case of *Flint* v. *Lowndes*. (1) The *Hope* there, while discharging outward cargo at Madras, was lost by perils of the seas. No part of the homeward cargo was then shipped. The captain had purchased at Madras, by order of his owner, twenty-five tons of redwood, and a firm called Binny & Co. had contracted to ship 122 tons of saltpetre; and Webster, one of the partners in that house, engaged to ship ninety tons of light goods, but as to those goods there was not any contract in writing. There was a policy on freight on the homeward voyage. The question was, had any

(1) 1 B. & Ad. 45.

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freight attached? or, to apply the usual test, was there any such right to freight as, but for the intervention of the perils insured against, would have resulted in freight being earned? At the trial before Lord Tenterden C.J., the learned judge told the jury that if the captain had a reasonable assurance that ninety tons of light goods would be shipped, "the assured had a right to recover, in respect of them, the freight which the vessel would have earned if they had been shipped and she had performed the voyage, though there was not any such contract as could be enforced by action." That seems to me precisely to be the suggestion made in this case. A rule nisi was obtained for a new trial on the ground of misdirection on two points, one of which was that very direction to the jury. The counsel shewing cause, who included Campbell, afterwards Chief Justice, and Pollock, afterwards Chief Baron, admitted undoubtedly as to the light goods that there must be a contract, "but here there was evidence of a contract, for Webster engaged to ship the light goods." Lord Tenterden C.J. himself, giving the first judgment, said (1): "To recover upon a policy of freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was some contract for doing so. The question was not submitted to the jury, whether there was any contract between Webster (acting on the behalf of Binny & Co.) and the captain for the shipment of the light goods." The defendant therefore was entitled to a new trial. In the end it was referred to a barrister to ascertain whether there was a contract to ship the light goods.

Then if one looks at the text-writers, Phillips, in ch. iii., s. xi., sub-ss. 328, 329, and 331, distinctly presents the alternatives either of goods ready to be shipped or of a contract with another person for freight. Arnould on Marine Insurance, 8th ed., says much the same thing, the material sections, I think, being 266 and 269. Passages are cited from the judgments of Lord Ellenborough and other great authorities which seem amply to bear it out. *Forbes* v. *Aspinall* (2) is such a case. There the

(1) 1 B. & Ad. at p. 48.

(2) (1811) 13 East, 323, at p. 332.

expression used is: "Where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship." In fact the *Ayrshire* when she started was a seeking ship, and on January 1 she was no more, except as to the apple contract and possibly the shipments by Birt & Co., although at that time there was a strong expectation that when she arrived in the Colony she would find a full and complete cargo: but in the ordinary course of business until five or ten days before her actual arrival no engagements, except for the apples, would be definitely made. If so, the test is, was there freight which was the subject-matter of some legal agreement giving the shipowner legal security enforceable as a charterparty would have been? It is conceded that as regards the apple contract there was such a contract existing at the time of the loss. Of course the material moment for this purpose is the time of the accident. The arrangement with Birt & Co. also was of such a character as to constitute a binding contract to get the vessel a cargo so far as her space would enable her to take it and so far as Birt & Co. were able to influence or to control a sufficient quantity. The terms of that arrangement are not before me, but I think the effect of it is that, by some promise enforceable because definite and supported by consideration, Birt & Co. were bound, had the vessel arrived on the coast, to do their best to get her a cargo, and as at the time she was expected there was a sufficiency of cargo, she was in the same position as though her requirements had been contracted for. Hence to the apple contract and to the shipments by Birt & Co. the term "freight chartered or as if chartered" would sufficiently apply: but separate considerations apply to the apple contract.

As to Birt & Co.'s shipments the issue between the parties is this: The plaintiffs say that this insurance covered freight on cargo to be shipped upon the *Ayrshire* at or about the expected dates of shipment upon a round voyage. The defendants say that it was an insurance upon the vessel's freight on her round voyage. If the former is the true view, the plaintiffs claim to recover because the vessel missed her dates. If the latter view is correct, then the defendants claim to succeed because, the vessel having made a round voyage as intended, the case comes within the

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principle of *Everth* v. *Smith* (1), a decision of Lord Ellenborough C.J., not, so far as I know, ever doubted. There, the insurance being simply on freight from Riga and Baltic ports to the United Kingdom, it was held that there was no loss because, although the ship, first because of embargo and afterwards because of frost, failed to carry the cargo that she was expected to carry, still when she was able to sail she got another cargo and earned freight upon the voyage homewards named in the policy. There is nothing in the policy itself which makes any express limitation of the voyage to a voyage occurring at the dates or substantially in accordance with the programme contemplated. When the *Ayrshire* reached Australia some three months later she found cargo and earned full freight upon her carrying capacity. Mr. Bailhache contends that the policy must be read in a more limited sense, as a policy upon the voyage commencing at the dates and loading at the ports in accordance with the programme, that if the vessel missed her date by an accident she missed her place and her cargo, and that the punctual observance of the advertised dates was the subject-matter of the insurance. I am far from saying that such an insurance could not be effected if appropriate language were used, but such a risk is a different risk, measurable by different considerations, from a mere insurance on freight per *Ayrshire* homeward from Australia to the United Kingdom. Practical difficulties suggest themselves if the defendants' view of the risk is correct. What happens if the vessel fails to keep her dates? If she carries cargo at another date, is that the same freight or another freight? If it is another freight, is it salvage to the underwriter? If it is the same freight, has there been any loss? All those questions arise on the plaintiffs' construction of the policy. I see no necessity for so construing it, first because of the flexibility intended and attained by those who formulated the programme; secondly, because such an interpretation does violence to the language by importing into the definition of the risk words which are not there. It is true that both parties knew that they were dealing with ships which run in a line and endeavour to conform to a programme, and that for some years past such vessels have

(1) 2 M. & S. 278.

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been insured in this way. In these circumstances the plaintiffs ask, what then is the risk insured against if there is no loss when vessels fail to keep their dates? The answer is that there would be a loss in respect of the apple contract, a very valuable one: and furthermore the state of the assured's mind when he executes a policy is irrelevant on the question of its construction. The circumstances of the line are not such as to limit this policy to an insurance on freight earned by shipment at or about the advertised dates. Moreover as to the cargo that went by the *Somerset* there was never more than a bare expectation that it would be carried by the *Ayrshire*. That cargo was not carried by her and in that sense she did not get her expected cargo, but she did get a cargo at another time, and carried it on her homeward voyage, and did earn the freight. I therefore think there has not been, as regards Birt & Co.'s shipments, a loss of freight, and I think that the same is true of all the other cargo, with the exception of the apple cargo, because there was no cargo which was definitely engaged for her, and for that sailing in the programme, except the Hobart apples.

Now comes the question of the Hobart apples. It is said that these are within the terms of the warranty which I have read—the special time penalty clause. I think that may be shortly disposed of. Whatever this contract may have been, it was not a special charter—it was not even a general charter. It was not a charter at all. It was "as if chartered," which means that, although it was like a charter, it was not a charter. In the next place, it contained no cancelling date. As is said by Lord Esher M.R. in *In re Jamieson and Newcastle Steamship Freight Insurance Association* (1), cancelling is a strictly understood term in shipping business. The cancellation clause has been for some twenty years at least a well-known clause. I have no doubt that this clause has direct reference to the well-known cancelling clause which contains a cancelling date. In this contract an arrival about March 20 is a condition precedent to the obligation to load at all; whereas a cancelling clause presumes an obligation to load although defeasible at the option of the shipper if the vessel fail to arrive at the specified

(1) [1895] 2 Q. B. 90.

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date. I do not think, therefore, that clause covers the Hobart contract.

Stopping there, the assured would have proved their loss in respect of the apples. They could have proved their insurable interest. There might be some difficult questions; the readjustment of the valuation of 15,000*l.*; the question whether the loss of a portion of the refrigerated cargo contemplated is a constructive total loss under the policy, or a partial loss; whether a notice of abandonment was necessary; and whether the subsequent carrying of the cargo of apples by the *Somerset*, and the earning of the freight on the apples, constituted a waiver of notice of abandonment. It is not necessary to discuss or decide these questions. There is a defence connected with the apple shipment, but going to the root of the whole question, and that is the defence of concealment. There has been, and can be, no suggestion of any wilful concealment, or impropriety, on the part of the plaintiffs. By sheer inadvertence those who caused this insurance to be effected omitted to inform the underwriters that in the apple contract March 20 or thereabouts was stipulated as the date at which the *Ayrshire* was to arrive and take the cargo. There has been a discussion as to how far concealment is a matter of law, and how far it is a matter of fact, but it is well settled now that evidence is admissible on the subject; and unless I can be satisfied, as a matter of law, that the point in question could not be material, it is a matter upon which I must be guided by the evidence as to whether it was material to a reasonable underwriter, with a view either to his taking the risk, or to the premium he would charge for taking it, to be apprised of the fact in connection with this insurance that the Hobart apple contract specified a date about which the vessel had to arrive. The Marine Insurance Act, 1906, codifies the law on that subject in s. 18. It is quite clear that in law it might be material. The risk, if there was no date in this contract, would merely be that when the vessel arrived at Hobart there might be no apples, in which case she could not earn freight by carrying them, and that she might be prevented from arriving at Hobart while there were apples to ship by perils of the sea. Considering that she was about to leave

English waters at the end of the year, and considering that the apple season at Hobart appears to extend for about two months, the underwriter would have a very considerable time within which the vessel might arrive and save her freight. If the time is to be about March 20, the risk is materially altered, and the likelihood of the underwriter being called upon to pay in the event of accident is considerably increased. The evidence called is all to that effect, and is all called by the defendants, and I must come to the conclusion that, as I should have expected, the circumstance in itself is a circumstance that is material to the risk.

[The learned judge then considered the question whether in the circumstances of the case the underwriters ought to have inferred that the contract for the Hobart apples would contain a date after which the cargo could not be loaded, and, having decided that there was nothing to put them on inquiry, and nothing to imply a waiver of their right to disclosure, continued:]

Therefore the defence of concealment is proved, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons & Co.*

W. H. G.

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May 7.

THE KING *v.* THE BARTON AND IMMINGHAM LIGHT RAILWAY COMPANY.

Ex parte SIMON.

Light Railway—Compulsory Purchase—Assessment of Compensation—Award —Mandamus to take up Award—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 35, 121—*Arbitration Act,* 1889 (52 *&* 53 *Vict. c.* 49)—*Light Railways Act,* 1896 (59 *&* 60 *Vict. c.* 48), *s.* 13.

By s. 13, sub-s. 1, of the Light Railways Act, 1896, where any order under the Act incorporates the Lands Clauses Acts, any matter which under those Acts may be determined by the verdict of a jury, by arbitration, or by two justices shall for the purposes of the order be referred to and determined by a single arbitrator, and the provisions of the Act shall apply with respect to the determination of any such matter in lieu of those of the Lands Clauses Acts relating thereto. By sub-s. 3 the Arbitration Act, 1889, shall apply to any arbitration under this section.

A light railway company under the powers conferred by an order made under the Light Railways Act, 1896, and incorporating the Lands Clauses Acts, took compulsorily certain lands in the occupation of a tenant from year to year. A single arbitrator was appointed under s. 121 of the Lands Clauses Consolidation Act, 1845, as amended by s. 13 of the Light Railways Act, 1896, to assess the amount of compensation payable in respect of the tenant's interest. The arbitrator duly made his award and tendered it to the company under s. 35 of the Lands Clauses Consolidation Act, 1845. The company refused to take up the award on the ground that the matter was governed by the Arbitration Act, 1889, and not by the Lands Clauses Consolidation Act, 1845:—

Held, that s. 13 of the Light Railways Act, 1896, affected only the assessment of the amount of compensation; that the process of enforcing the award remained, as formerly, under the Lands Clauses Consolidation Act, 1845; and consequently that a writ of mandamus would issue ordering the light railway company to take up the award.

Rule Nisi calling on the Barton and Immingham Light Railway Company to shew cause why a writ of mandamus should not issue to them commanding them to take up the award of an umpire appointed by the Board of Trade pursuant to the provisions of s. 121 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (1), as amended by s. 13 of the

(1) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121: "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to

Light Railways Act, 1896 (59 & 60 Vict. c. 48), as to the amount of compensation to be paid to one Frederick Ernest Simon by the said railway company in respect of certain lands situate at South End, Goxhill, in the county of Lincoln, taken compulsorily by the railway company under powers contained in the Barton and Immingham Light Railway Order, 1908.

The Light Railway Order incorporated the Lands Clauses Consolidation Act, 1845, as varied by the Light Railways Act, 1896.

Frederick Ernest Simon was the tenant from year to year of

year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13: "(1.) Where any order under this Act incorporates the Lands Clauses Acts, any matter which under those Acts may be determined by the verdict of a jury, by arbitration, or by two justices shall for the purposes of the order be referred to and determined by a single arbitrator appointed by the parties, or if the parties do not concur in the appointment of a single arbitrator then by the Board of Trade, and the provisions of this Act shall apply with respect to the determination of any such matter in lieu of those of the Lands Clauses Acts relating thereto. Provided that in determining the amount of compensation, the arbitrator shall have regard to the extent to which the remaining and contiguous lands and hereditaments belonging to the same proprietor may be benefited by the proposed light railway . .

"(3.) The Arbitration Act, 1889, shall apply to any arbitration under this section."

Lands Clauses Consolidation Act, 1845, s. 35: "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose

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certain land at Goxhill which had been taken compulsorily by the railway company. A difference having arisen in settling the amount to be paid by the company to F. E. Simon for compensation in respect of his rights as tenant of the land so taken, an application was made by the company to the Board of Trade for the appointment of a single arbitrator under s. 121 of the Lands Clauses Consolidation Act, 1845, as amended by s. 13 of the Light Railways Act, 1896, in respect of the claim of F. E. Simon, and an arbitrator was appointed accordingly.

The arbitrator duly made his award and tendered it to the company, but the company refused to take it up.

A rule nisi having been obtained as stated above,

Colam shewed cause. There is no jurisdiction to order the respondents, the Barton and Immingham Light Railway Company, to take up this award. Sect. 13 of the Light Railways Act, 1896, substitutes for the tribunals erected by the Lands Clauses Consolidation Act, 1845, a single arbitrator, and by sub-s. 3 of that section the Arbitration Act, 1889 (52 & 53 Vict. c. 49), is to apply to any arbitration under the Act. The proper means for enforcing an award under the Arbitration Act, 1889, is not by mandamus to either party commanding him to take up the award, but by application to the Court or a judge under s. 12 of that Act for leave to issue execution upon the award or in a proper case by an action on the award.

Eustace Hills, in support of the rule. The assessment of the amount of compensation and the recovery of the amount assessed are two different things. Under the Lands Clauses Consolidation Act, 1845, the amount was assessed by justices or by a jury or by arbitration. When the amount has been assessed then the process of recovering the amount awarded comes into operation. When the assessment was by arbitration the process of enforcing the award was under s. 35 of the Act. The arbitrators delivered their award in writing to the promoters of the undertaking. If the promoters neglected or refused to take up the award, a mandamus would go to compel them: *Reg.* v. *South Devon Ry. Co.* (1); *Reg.* v. *London and North Western Ry. Co.* (2); *Earl of*

(1) (1850) 15 Q. B. 1043. (2) [1894] 2 Q. B. 512.

Shrewsbury v. *Wirral Railways Committee* (1); *Reg.* v. *London and North Western Railway.* (2) Sect. 13 of the Light Railways Act, 1896, affects the basis of assessment and alters the tribunal for the assessment of the amount of compensation. It does not affect the process of enforcing the award when made. That process remains as it was under s. 35 of the Lands Clauses Consolidation Act, 1845. Consequently, if the promoters will not take up the award when tendered to them, the proper procedure is by writ of mandamus.

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Lord Alverstone C.J. This rule must be made absolute. In cases where s. 35 of the Lands Clauses Consolidation Act, 1845, applies, a mandamus will issue to compel the promoters to take up the award of arbitrators or an umpire if they refuse or neglect to do so. That was decided in *Reg.* v. *South Devon Ry. Co.* (3) It is true that in this particular case the amount of compensation would have been determined under s. 121 by two justices, but that fact appears to be immaterial, because the tribunal for assessing compensation as well as the basis of compensation has been altered where land is taken for the purposes of a light railway. By s. 13 of the Light Railways Act, 1896, where any order under the Act incorporates the Lands Clauses Acts any matter which under those Acts may be determined by the verdict of a jury, by arbitration, or by two justices shall for the purposes of the order be referred to and determined by a single arbitrator appointed by the parties, or if the parties do not concur in the appointment of a single arbitrator then by the Board of Trade, and the provisions of this Act shall apply with respect to the determination of any such matter in lieu of those of the Lands Clauses Acts relating thereto. The effect of that enactment is to substitute a single arbitrator for the tribunals theretofore existing for the assessment of compensation in all cases, whether the compensation was assessable by justices or by a jury or by arbitration. But the new legislation only extends to the assessment of the amount of compensation and the basis of the assessment. It does not extend to the enforcing of the award after it has been made.

(1) [1895] 2 Ch. 812. (2) [1899] 1 Q. B. 921, at p. 926.
(3) 15 Q. B. 1043.

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Consequently the award remains enforceable as it was under s. 35 of the Lands Clauses Consolidation Act, 1845, unaffected in this respect by the Arbitration Act, 1889. The rule must therefore be made absolute.

PICKFORD and AVORY JJ. concurred.

Rule absolute.

Solicitor for prosecutor : *James B. Somerville.*

Solicitors for respondents *Vincent & Vincent, for Day & Yewdall, Leeds.*

W. H. G.

C. A.

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June 25, 26.

[IN THE COURT OF APPEAL.]

DENTAL MANUFACTURING COMPANY, LIMITED *v.* C. DE TREY & CO.

Passing-off Action—Sole Agent for Sale of Article made by a particular Manufacturer—Alleged Imitation of "Get-up" of that Article by another Manufacturer—Claim of Injunction by Agent—Absence of Evidence of any "Get-up" of the Article which has become associated with Agent—Claim for passing off not maintainable.

The sole agent for sale of an article made by a particular manufacturer cannot maintain a passing-off action against a person who passes off an article made by himself as the article made by that manufacturer merely on the ground that his, the agent's, profits through sale of that article are thereby diminished.

A firm were the sole agents for sale in this country of an article made by a particular manufacturer in the United States. They sold the article just as it was made and got up by that manufacturer, and nothing in the "get-up" of the article as sold by them indicated any association of them or their business with that article. A company having manufactured and sold articles of the same kind with a "get-up" alleged by the firm to be similar to that of the before-mentioned article as supplied by the manufacturer in the United States, the firm sued that company for passing off those articles as articles sold by the firm :—

Held, affirming the judgment of Pickford J., that they could not maintain such an action against the company,

Semble, that, if the firm had sold the article under any "get-up" of

their own, which the company had imitated, they might have maintained a passing-off action against the company.

Judgment of Kay J. in *Richards* v. *Butcher* (1890) 7 Rep. Pat. Cas. 288, followed.

APPLICATION for judgment or a new trial upon a counter claim by the defendants in an action tried by Pickford J. with a jury.

The action was for libel, alleged to impute dishonest and dishonourable conduct to the plaintiffs, as manufacturers and traders, which was contained in a circular published by the defendants in relation to a certain kind of spittoon, known as the "Clark Double Bowl Fountain spittoon," which was sold by the defendants, and a spittoon sold by the plaintiffs, which they called the "Twentieth Century Double Bowl Crystal Fountain spittoon," and which the defendants alleged to be an imitation of their spittoon.

The defendants counterclaimed against the plaintiffs, alleging that they were selling spittoons, which they called the Twentieth Century Double Bowl Crystal Fountain spittoons, made and got up by them so as to imitate the Clark spittoon, and so were passing off spittoons made by them as the defendants' spittoons. They therefore claimed damages, and an injunction restraining the plaintiffs from selling any Twentieth Century Double Bowl Fountain spittoons so got up in imitation of the goods of the defendants, or from selling any spittoons so got up in imitation of the defendants' goods as aforesaid.

One Clark, who carried on business at Chicago, in the United States, was the manufacturer of a special kind of spittoon, intended for use in a dentist's business, and known as the "Clark Double Bowl Fountain spittoon," for which he had down to July 27, 1910, a patent in the United States. By agreement with Clark, made on August 13, 1901, the defendants had been granted by him for a term of years, and still continued to have, "the exclusive right and agency to sell and distribute the 'Clark Fountain spittoon,' the manufacture of" the said Clark, "in Continental Europe and Great Britain and the Colonies of Great Britain, exclusive of British Colonies in North and South America, Australia, and New Zealand." By the agreement Clark contracted to supply to the defendants, and the defendants contracted to

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purchase from Clark, not less than a certain number of the spittoons in each year at certain agreed prices, and Clark agreed to use his best endeavours, as far as possible, to dissuade and prevent American dealers from selling, or purchasers in America selling, the aforesaid "Clark Fountain spittoon" to dentists, dental supply houses, or agencies in the countries named in the agreement, and not to supply directly or indirectly with the said "Clark Fountain spittoon" any person or persons, dentists, dental supply houses, dealers or agencies who sell the same, or purchase for the purpose of selling the same, in the countries named in the agreement. (1)

By an agreement made on August 31, 1901, the defendants appointed the plaintiffs their sole "distributing agents" for the sale of the "Clark Fountain spittoon" in the United Kingdom for a certain period upon certain terms mentioned in the agreement, and under that agreement the defendants sold the spittoons supplied to them by Clark to the plaintiffs, who retailed them to purchasers in the United Kingdom. In a circular issued by the plaintiffs on the subject of "Clark's spittoons" they had advertised the name of the defendants as "sole wholesale agents" for those articles and their own name as "general distributors" of them only for the United Kingdom. The case set up by the defendants was, in substance, that the "Clark Fountain spittoon" was got up in a manner which had become distinctive of that article in the market, and that this "get-up" of his spittoons was associated with the business of the defendants as sole agents for the sale thereof so as to indicate spittoons sold by them. The defendants had always sold the spittoons just as they were got up by Clark, and had not, in selling them, made use of any "get-up" of their own (as distinguished from the "get up" of the spittoon as manufactured by Clark), which had become distinctive of them as being sold by the defendants. As will be seen hereafter, Pickford J. was of opinion that the evidence did not shew that

(1) It will be observed that, as is common in such cases, though the agreement purported to be one of agency, the legal relation between Clark and the defendants was not really one of principal and agent, but one of vendor and purchaser of the spittoons.

there was anything in the "get-up" of the Clark spittoon, as sold by the defendants, which had become associated with the defendants in this country so as to indicate spittoons sold by them. On July 29, 1910, Clark's patent in the United States having then expired, the agreement with the defendants under which the plaintiffs acted as "sole distributing agents" of the Clark spittoons in the United Kingdom was terminated at the request of the plaintiffs, and, subsequently, the plaintiffs began to manufacture and sell a spittoon on the same principle which they called the "Twentieth Century Double Bowl Crystal Fountain spittoon." As before stated, the case set up by the defendants was that this spittoon was so got up as to be an imitation of their spittoons, but, as will be seen from the judgments, the Court of Appeal was of opinion that upon the facts there was nothing by way of "get-up" of the Clark spittoons sold by the defendants which had become distinctive of them as being the defendants' spittoons.

The jury found a verdict for the plaintiffs on the claim for 100*l.* damages, for which judgment was entered for the plaintiffs. On the counter-claim the jury found, in substance, that the "get-up" of the plaintiffs' spittoons was calculated to lead purchasers to suppose that they were purchasing Clark's spittoons, and they assessed the damages at 100*l.*

The learned judge did not put to the jury the question whether the "get-up" of the spittoon as manufactured by Clark had become so associated with the defendants in this country as to indicate their spittoons, and on further consideration he held that there was no evidence that this was the case.

On further consideration Pickford J. held, on the authority of *Richards* v. *Butcher* (1), that the defendants could not as exclusive agents for the sale of the Clark spittoon under the circumstances maintain an action for passing off, and that, there being no evidence to show that the "get-up" of the Clark spittoons had become exclusively associated with the defendants in this country so as to indicate their goods, their counter-claim must fail. He therefore gave judgment for the plaintiffs dismissing the counter-claim.

(1) 7 Rep. Pat. Cas. 285.

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The grounds stated in the defendants' notice of application for judgment or a new trial were: 1. That the evidence put forward by the defendants in support of their counter-claim was sufficient to entitle the jury to find for the defendants thereon, and that the judge ought to have directed judgment for the defendants on the counter-claim for the damages awarded by the jury, and ought to have granted the further relief asked for by the defendants. 2. That the judge was wrong in law in holding on further consideration that the defendants, being sole importers and purchasers of the "Clark Double Bowl Fountain spittoon," owned and manufactured by Clark, were incompetent to maintain their counter-claim. 3. That the judge was wrong in law in holding on further consideration that there was no evidence that the "Clark Double Bowl Fountain spittoon" was associated with the name of the defendants in such a way as to entitle the defendants to maintain an action for passing off, and in directing judgment for the plaintiffs on the counter-claim. 4. That the plaintiffs, by allowing the counter-claim to proceed till verdict on the basis that the only issue of fact was whether the spittoons manufactured by the plaintiffs were calculated to deceive, had waived their right to rely upon the contention that there was no evidence of such association as aforesaid.

A. J. Walter, K.C., and *Grimwood Mears*, for the defendants. The learned judge was wrong in holding that exclusive agents for sale of goods, such as the defendants were, cannot as a matter of law maintain an action for passing off in respect of the goods for the sale of which they are such agents. He was also wrong in holding that the "get-up" of the Clark spittoon had not become associated with the defendants so as to entitle them to maintain their counter-claim on the principle indicated in *Goodfellow* v. *Prince* (1), which is by implication an authority in the defendants' favour. For nearly ten years the defendants had done a large business in the sale of this spittoon under the name of Clark's spittoon, and the plaintiffs' own circular associated the defendants with that article as one for the sale

(1) (1887) 35 Ch. D. 9.

of which by wholesale the defendants were exclusive agents. The basis of the action for passing off is injury to goodwill: *Barberrys* v. *J. C. Cording & Co.* (1) The defendants had acquired a goodwill in respect of their business as such exclusive agents, and were entitled to be protected in respect thereof against other persons passing off their own goods as the Clark spittoons which the defendants sold. The trial was all through conducted on the footing that the only issue on the counter-claim was whether there had been a passing off by the plaintiffs of their spittoons as the Clark spittoons, and that, if there had been such a passing off, the defendants were entitled to maintain their counter-claim. The plaintiffs ought not to have been allowed after verdict to take the point that the Clark spittoons had not become associated with the defendants. If the point had been taken before verdict the defendants might have adduced further evidence on that point.

By the agreement between Clark and the defendants, the former in effect transferred to the defendants a part of his interest and goodwill in respect of the sale of the Clark spittoon in this country and on the Continent for a term of years, and the defendants became entitled to be protected against any passing off as Clark's of goods which were not his, just as he would have been if he had not entered into that agreement. The defendants had such an exclusive interest in the sale of Clark's spittoons in this country as is entitled to protection against such a passing off. Decisions with reference to trade mark and copyright, which are creatures of statute, and in respect of the wrongful use of which only the person who is on the register as owner can sue, have no application to a case like the present. [They also cited and discussed *Richards* v. *Butcher* (2); *Warwick Tyre Co.* v. *New Motor and General Rubber Co.* (3); *Reddaway* v. *Banham* (4); *In re Apollinaris Co.'s Trade Marks* (5); *Birmingham Vinegar Co.* v. *Powell.* (6)]

Disturnal, K.C., and *McCardie* (*Colefax* with them), for the plaintiffs, were not called upon to argue.

(1) (1909) 26 Rep. Pat. Cas. 693.
(2) 7 Rep. Pat. Cas. 288.
(3) [1910] 1 Ch. 248.
(4) [1896] A. C. 199, 209, 210.
(5) [1891] 2 Ch. 186, 226.
(6) [1897] A. C. 710.

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VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. It was alleged in argument that Pickford J. in this case laid down a proposition which was wrong, namely, that an exclusive agent for sale of goods cannot protect any rights which he has of this sort by an action for passing off. Assuming that he laid that down, I am not going to decide whether that is a correct proposition or not. It is not necessary, I think, to decide that in this case. My own impression is that an action for "passing off" would, under proper circumstances, be available as a protection for an exclusive agent for sale; but I do not intend to decide that matter, because there is, in my opinion, in this case a fatal objection to this counter-claim, which does not depend upon any such proposition as is said to have been laid down by the learned judge. The matter to which I refer is this: it was admitted during the course of the argument that the counter-claim for passing off would not lie, if the only thing upon which it could be based was the mere fact that the defendants were the exclusive agents for sale of these goods manufactured by Clark in America. It was admitted, that in order to support the counter-claim, there must be something to identify these particular articles dealt in by De Trey & Co. with them—some peculiar feature, either in the "get-up," or in shape, or whatever it may be—and, that being admitted, we asked, what was the peculiar feature of the "get-up" here which identified these goods with De Trey & Co. It was said that there was a mark on these spittoons which was registered in America, and which identified the goods as the manufacture of Clark. But where, we asked, is the "get-up" which identifies these goods as the goods which are habitually sold by De Trey & Co.? It appears to me impossible to say that there is anything in the "get-up" of these goods which can be called significant of De Trey & Co.'s goodwill or business. In these circumstances it seems to me that there is a fatal objection to the defendants' counter-claim. I do not think that I am called upon to go through in detail all the cases cited, and arguments addressed, to us in this case. There is nothing in the facts of this case which associates these particular spittoons with the name and business of De Trey & Co. It is quite true that for some years the fact that De Trey & Co were the exclusive wholesale agents for the sale of these goods in

Great Britain did give them an effective exclusive right, because the goods originated with Clark, and, if he kept his contract for exclusive agency with the defendants, it was impossible during that period that any one else could sell them in England except through De Trey & Co. Under those circumstances it is perfectly true that De Trey & Co. did practically have the exclusive wholesale agency for the sale of these spittoons. But, as I have said, that fact alone could not form a sufficient basis for the counter-claim for passing off. I need not say any more upon the subject. I decide this case upon the simple ground, so far as I am concerned, that there is nothing in the "get-up" of these goods to identify them with De Trey & Co., and they are goods which can, at all events now, be sold, and are sold, without exposing the people who sell them in England to any action by De Trey & Co. Now the letters patent have come to an end, I do not see how even Clark could sustain any action unless the circumstances were such that goods were being passed off as being Clark's goods, when in fact they were not his. If that were so, there would be a cause of action, but not a cause of action in De Trey & Co., but in Clark. I think the appeal fails and must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The facts appear to me to be very simple. Clark in America was possessed of a patent for these spittoons, which expired on July 27, 1910. About ten years before that date he entered into an agreement with the defendants, by which they were to purchase a certain number of these spittoons from him every year at a certain price, and, in consideration of that, he agreed to do his best to prevent the spittoons from coming on to the English market by any other channel. It is quite evident from the terms of the agreement that both parties realized that these spittoons might be sold to third parties who would sell them again in England, and I find no undertaking on his part to exercise his rights with regard to his English patent so as to prevent them from being sold by any one in England. The parties simply trusted to the promise that he would not directly sell them to any one for the purpose of importing into England.

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It appears that for nine years the defendants were not disturbed by competition at all. As a matter of fact all the spittoons of this class which were sold to the English public came through them as the sole wholesale agents. They had the plaintiffs as their sole distributing agents. Therefore, during the existence of those arrangements, customers bought the spittoons from the plaintiffs, who got them from the defendants, who got them from Clark. One thing is perfectly clear; the things were bought as Clark's spittoons, and were supplied exactly as Clark supplied them, and there was nothing whatever on the spittoons, as delivered to the customers, that indicated in any way any connection either of the plaintiffs or of the defendants with those spittoons. When the patent expired on July 27, 1910, the plaintiffs put an end to the arrangements with the defendants under which they were their sole distributing agents for these spittoons. They were perfectly free to manufacture these spittoons in future, and therefore they determined their arrangement to receive them from, and distribute them for, the defendants; and they manufactured a spittoon on the same principle, and put it on the market.

I look with great jealousy at any attempt by a patentee to prolong the monopoly given to him by the patent after it has expired. Of course, during the whole of the time that the patent in this case existed, persons recognized, by the presence of the peculiarities of the invention, that the articles were made by the patentee, because he was the sole manufacturer. But the patentee cannot rely on such matters. They were the outcome of a monopoly that has now ceased. Therefore it appears to me to be very doubtful whether the jury were properly instructed as to what resemblance to the articles sold during the term of the patent would be sufficient to make an article one which the British public were not free to make and sell after the expiration of the patent. The mere fact that persons seeing an article would think it to be a Clark spittoon is not sufficient, because, during the existence of the patent, they have been accustomed to recognize as Clark's spittoon one having these peculiarities. I will assume, however, for the purposes of my decision that Clark could restrain the plaintiffs from making and selling these

spittoons on the ground that they were passing off goods as the goods of Clark. I do not for one moment mean by that to decide that such was the case, but I will assume that the finding of the jury amounts to that.

The defendants put their case in this way: they say "Clark's goods have been imitated: we are persons who, by reason of our special position, derive a profit from selling Clark's goods: therefore we have a right to apply to the Court to restrain imitations of Clark's goods being put on the market." In my opinion no such right has ever been recognized, or should be recognized, by the Courts. There is a right in a plaintiff to come to the Court to prevent any goods being passed off as his which are not his goods: and, when I say that, I include goods which he has manufactured, goods which he has purchased and sold—any goods that can fairly be called his goods. In respect of these he can restrain an attempt to pass off goods that are not his, as though they were his. But in this case it is clear that in no proper sense of the word were these goods ever regarded by the public as, nor were they in truth, De Trey & Co.'s goods, and there never was any representation on the part of the plaintiffs that the alleged infringing articles were De Trey & Co.'s goods. Taking the view of the facts which is most favourable to the defendants, the sole representation was that they were Clark's goods, by reason of the fact that the whole of these spittoons that had been sold in the market prior to the action had been regarded in the market as Clark's goods. The proposition of law upon which the defendants' case really depends is that, if a person is injured by goods being passed off as another person's goods, that gives *him* a right of action. In my opinion it does not.

Mr. Walter insisted, (though his junior did not,) on the exclusive character of the defendants' rights. In my opinion those rights were not exclusive in any sense which affects the public, more especially after the expiration of the patent. I think that Kay J., afterwards Kay L.J., puts the true legal position of the matter in the case of *Richards* v. *Butcher* (1) to which we were referred. In that case persons, who were sole

(1) 7 Rep. Pat. Cas. 288, at p. 291.

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agents for the sale of Heidsieck's wine, sought to restrain other persons from selling wine with marks upon it very closely resembling the trade mark of the Heidsieck firm. Of course they could not rely on any rights in respect of the trade mark, because they did not possess them ; but the putting on of a trade mark may be not only an infringement of the property in the trade mark, but also a representation that the goods are the goods of the person owning the trade mark. Consequently, the learned judge treated the plaintiffs' case from both points of view. With regard to the second, he said : "I at once put it to the plaintiffs' counsel : 'What difference is there in your position with regard to this question from that of any other purchaser of Heidsieck's wine ; if you can restrain anybody from selling as "Monopole" wine which is not "Monopole," that is not produced by Messrs. Heidsieck, why should not every purchaser of Heidsieck's wine have the same right?' The answer was, because we have the exclusive right. What does that mean ? It only means that Messrs. Heidsieck have contracted that they will not sell any of their wine to any other persons in England, except Mr. Richards ; but, if, by any means whatever, another person gets Heidsieck's wine, if he buys it in France, or buys it in Germany, or in England, or buys it of the plaintiffs, or buys it of anybody else, he has a right to sell it. The plaintiffs cannot prevent him—nobody can. He has a perfect right to sell it ; it is an article of commerce in which he has a perfect right to deal. It is said, we admit, as of course the plaintiffs are bound to admit, that every purchaser of Heidsieck's wine, or every possessor of Heidsieck's wine in this country, could not maintain a suit for such an injunction as we have now brought, but we can do so, because, by bargain with Messrs. Heidsieck, we have the exclusive right. Let me examine what that means. It means no more than this, that Messrs. Heidsieck bargained, for value no doubt, with the plaintiffs, that they would not sell to any other Englishman for sale in this country except to them. How does that give them a right to restrain which other purchasers of Heidsieck would not have had ? I cannot follow the argument." Every word of this applies here. If mere damage is sufficient to entitle a person to bring an action to prevent another passing

off his goods as the goods of a third party, then it does not matter what the quantum of damage is, or how it has arisen. It may be because that person has a large stock of the goods of that third party; or it may be because he can purchase cheaply from that third party, and has made it a leading line in his business; or it may be that he has this so called, but wrongly called, exclusive right: all these are mere instances of damage to a person arising from the infringement of the rights of a third party. In my opinion, no degree of mere damage is sufficient to entitle a plaintiff to bring such an action as this. He can only bring it when the representation is that the goods are his. In this case, as I have pointed out, the only possible representation is that the plaintiffs were wholesale agents of Clark. Clark might have changed his wholesale agency. It could not be said that the public then would be entitled to refuse goods which had come through the new agency, because they had always been accustomed to goods which had come by another channel. To my mind it would be an injurious and ridiculous extension of the doctrine of passing off to say that, where the sole representation is that the goods are the goods of a particular manufacturer, it should be held that that carries with it a representation that they have come through any particular channel; or, putting it conversely, that any one who is injured by the passing off of goods as the goods of a third party can bring an action.

For these reasons I am of opinion that, even assuming that on the expiration of the patent the public rights were not sufficient to entitle the plaintiffs to make these particular articles in the colour, shape, and size used by them, and that the articles sold were an infringement of the rights of Clark, they certainly were not any infringement of any rights possessed by the defendants, and therefore the defendants' counter-claim fails.

BUCKLEY L.J. A passing-off action is one in which the plaintiff alleges that the defendant is injuring him in his property by wrongfully intercepting trade which, but for the defendant's wrongful acts, would come to the plaintiff in his business. It is an action in which the plaintiff alleges that the defendant so gets up his goods as that the public, intending to buy the plaintiff's

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goods, are induced to buy the defendant's goods, in the belief that they are buying the plaintiff's goods. The plaintiff's goods need not be goods manufactured by the plaintiff. They may be goods which he purchases, or which he imports, or otherwise acquires, and which he sells under some "get-up" which conveys that they are goods which, whether made, imported, or sold by him, carry with them the advantage of the reputation that the plaintiff's well-known firm are responsible for their quality or their character. I do not doubt that a person dealing with the goods of another may have a goodwill in the business of dealing with them. A carrier who carries the goods of others may have a goodwill in his business of carrier. An agent who is the agent for the sale of the goods of others may have a goodwill in his agency business, and, as such agent, may have a "get-up" whose reproduction may entitle him to succeed in a passing-off action. To apply that to the present case, I myself entertain no doubt that De Trey & Co., as sole agents for the sale of Clark's spittoons, may have a goodwill in respect of that business; and I have no doubt that, if they had a "get-up" of their own under which they sold Clark's goods, they might succeed in a passing-off action. Those are propositions which it is not necessary to decide for the purposes of this case, but they are propositions which, I think, are true, and upon the basis of which I proceed in this judgment.

The facts were these. For many years De Trey & Co. had been sole agents for the sale of Clark's spittoons. Clark's spittoons had a particular form of ornamentation and decoration into the particulars of which I need not go. It is sufficient to say that the jury, in awarding 100*l.* damages, must have been satisfied that there was a "get-up" of some sort or other. I assume that there was a "get-up." It was, however, Clark's "get-up," and not De Trey & Co.'s "get-up." Let me assume that the Dental Manufacturing Company lead the purchaser to believe that he is purchasing Clark's goods, when he is not; it remains that they do not lead the purchaser to believe that he is purchasing De Trey & Co.'s goods, when he is not. By that last expression I mean that there is nothing to lead the purchaser to believe that he is purchasing a Clark spittoon for whose genuineness or quality or character

De Trey & Co. are responsible. De Trey & Co. have no "get-up" which connects the goods with them. The only way in which the goods are connected with them is that by contract with Clark, and so far as Clark can control the matter, De Trey & Co. ought to be the only persons who would have the goods and be able to supply them. Their proposition in fact is this: they say "We have been wholesale sellers so long that every purchaser must have thought, and must have relied on the assumed fact, that we are the wholesale sellers of this article which the purchaser bought." Even if that were true, that, in my opinion, would not give a cause of action. For the purchaser obviously did not think that he was buying from De Trey & Co., inasmuch as the complaint is that he had gone to some one else to get what he wanted. The most that he can have thought was that he was buying an article of which De Trey & Co. had, at some previous date, been the seller. It did not matter to the buyer whether that was so or not. The question material to him was whether it was a Clark spittoon. If it was not, he was deceived; but deceived, not as to whether De Trey & Co. had, at some previous stage in the existence of that article, been the sellers of it, but as to whether Clark had been the maker of it. The proposition, of course, altogether turns on this, that there is not conveyed to the purchaser of the goods anything which, by way of "get-up," says to the purchaser, "This is a thing for which De Trey & Co. are responsible, not necessarily as makers, but as persons who have dealt in it, and who guarantee its quality to you."

There was another proposition put. Mr. Walter, I think, disclaimed it; but, whether he did or not, it certainly seems to me that it cannot be maintained. It is this: A sale of goods which are not Clark's, with a "get-up" which induces the belief that they are Clark's, gives Clark a right of action: De Trey & Co., as agents for the sale of Clark's goods, are injured by the sale of goods purporting to be Clark's which are not Clark's because they have an interest as sale agents, and, of course, derive a profit from that relation to Clark. In my judgment a person deriving title under Clark, as being entitled to some part of the profit resulting from the sale of Clark's goods, cannot exercise Clark's right of action for passing

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off. If he could, it would follow that every commercial traveller who was paid by commission could bring such an action. There is no authority and no principle for such a proposition. Mr. Walter, I think, disclaimed the main proposition, but he sought to maintain a smaller proposition and said that the matter is differentiated by the fact that De Trey & Co. were the sole wholesale agents in this country. I fail to recognize any sound ground of discrimination upon that footing. Whether De Trey & Co. be the sole wholesale agents or not, the Dental Manufacturing Company have not, by adopting any "get-up" which is employed by De Trey & Co. to identify the goods with them, conveyed to the purchaser a belief contrary to the truth that the goods are De Trey & Co.'s goods. They are persons interested, I agree, in the deception of the purchaser, if he is deceived, by selling to him an article which is not Clark's make, and inducing him to believe that it is Clark's make. But they are only interested in that in the sense that it would diminish the profits that would go into their pocket, as agents, by the fact that that sale is improperly made.

In my judgment this appeal must be dismissed, not upon the ground that the sole agent for sale has not a goodwill, and cannot succeed in a passing-off action, because in proper circumstances I think that he would have a goodwill and could succeed in such an action, but I think the defendants here fail upon the facts, because there was no representation whatever affording any basis for a passing-off action that these goods were in any material sense the goods of De Trey & Co. The purchaser was not induced to buy by reason of anything which connected the goods with De Trey & Co. On that ground I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Lewis & Lewis.*

Solicitors for defendants: *Percy Robinson & Co.*

E. L.

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May 9.

Husband and Wife—Desertion—Order for Weekly Payments—Return to Cohabitation — Arrears recoverable — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 7, 8, 9—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 54—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, any married woman whose husband has deserted her may apply to a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which the cause of complaint has arisen, for an order under the Act. By s. 5 the Court to which application is made may make an order containing (*a*) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty); (*c*) a provision that the husband shall pay such weekly sum not exceeding two pounds as the Court shall consider reasonable.

By s. 7 a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any order under the Act has been made may, on the application of the married woman or of her husband and upon cause being shown upon fresh evidence, alter or discharge any such order. If any married woman upon whose application an order is made under the Act voluntarily resumes cohabitation with her husband the order upon proof thereof is to be discharged.

By s. 8 all applications under the Act are to be made in accordance with the Summary Jurisdiction Acts. By s. 9 the payment of any sum of money directed to be paid by any order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation, that is to say, under s. 4 of the Bastardy Laws Amendment Act, 1872, by distress, and in default of sufficient distress by warrant of committal to gaol for the term therein specified unless the sum due under the order of affiliation with costs be sooner paid.

By the Summary Jurisdiction Act, 1879, s. 54, the Act is to apply to the levying of sums adjudged to be paid under an order enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums as if an order so enforceable were a conviction on information. The Act is to be construed as one with the Summary Jurisdiction Act, 1848. By s. 11 of the last-named Act, in all cases where no time is specified for making or laying a complaint or information in the Act relating to the particular case, the complaint is to be made and the information laid within six calendar months from the time when the matter of the complaint or information arose.

A married woman having been deserted by her husband obtained

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from a stipendiary magistrate an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, directing her husband to pay a weekly sum for her maintenance. After the date of this order, namely, on November 17, 1906, and at various dates down to February, 1907, the parties resumed cohabitation. On December 1, 1911, the husband was brought before justices on the information of the wife, who alleged that a sum of 97*l.* 4*s.* had accrued due in respect of arrears of weekly payments. This sum had accrued since November 17, 1906. The justices made an order committing the husband in default of distress to imprisonment for three months, unless all the arrears were sooner paid or satisfied:—

Held, that the committal was bad because no more than six calendar months' arrears were recoverable.

Held, also, *per* Lord Alverstone C.J. and Pickford J. (Avory J. not assenting), that the return to cohabitation did not of itself annul the order for weekly payments, but that the order remained in force until discharged under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895.

CASE stated by justices of the peace for the Brentford petty sessional division of the county of Middlesex.

On February 1, 1904, an order was made by the stipendiary magistrate of Lambeth under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) (1), that the appellant, who was proved to have deserted his wife, the respondent, should pay her the weekly sum of 1*l.*

On February 13, 1905, this order was varied by the same stipendiary magistrate on the application of the appellant, and the weekly sums payable under the former order were reduced to 12*s.*

On December 1, 1911, there being then alleged to be due under the above-mentioned orders the sum of 97*l.* 4*s.* from the appellant to the respondent, the appellant was brought before the justices of the Brentford division on a warrant on the information and complaint of the respondent. The sum of 97*l.* 4*s.* had accrued since November 17, 1906. On that date and at various dates down to February, 1907, the appellant and respondent had resumed cohabitation.

The information and complaint of the respondent were heard before the justices on December 1, 1911. On the hearing it was contended on behalf of the appellant that the resumption of

(1) See note on p. 104, post.

cohabitation had annulled the orders of the stipendiary magistrate and that payments accruing due thereafter could not be enforced. In support of this contention s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, and the schedule to that Act and the case of *Haddon* v. *Haddon* (1) were cited.

On behalf of the respondent it was contended that evidence of resumption of cohabitation could not be received and that the orders of the stipendiary magistrate remained in force and enforceable until discharged.

The justices overruled the objection to the evidence of resumption of cohabitation, but, being of opinion that the resumption of cohabitation did not preclude the enforcement of the payment of arrears up to the date of the hearing, they committed the appellant in default of distress to imprisonment for three calendar months unless the sum of 97*l.* 4*s.* were sooner paid or satisfied.

On the application of the appellant the justices stated for the opinion of the King's Bench Division a case in which the above facts appeared.

The question for the opinion of the Court was whether upon the above statement of facts the determination of the justices was correct in point of law.

G. T. Martin, for the appellant. The justices were wrong in holding that the return to cohabitation did not annul the order for weekly payments. The point is decided by the case of *Haddon* v. *Haddon* (1), a case which arose upon s. 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19). The same reasoning applies in the case of a similar order made under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, which embodied the previous legislation. Sect. 4 of the Matrimonial Causes Act, 1878, enacted that if a husband were convicted of an aggravated assault upon his wife, the Court or magistrate before whom he was convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should be no longer bound to cohabit with her husband; and that such an order should "have the force and effect in all respects of a decree of

(1) (1887) 18 Q. B. D. 778.

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judicial separation on the ground of cruelty." The order might further provide that the husband should pay to his wife such weekly sum as the Court or magistrate might consider in accordance with his means and with any means which the wife might have for her support, and that the payment of any sum so ordered should be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation. The Court or magistrate by whom any such order for payment of money was made was empowered to vary the order from time to time on the application of husband or wife, upon proof that the means of the parties had altered since the last order. An order for the custody of any children of the marriage might also be made. Any order for payment of money or for the custody of children might be discharged by the Court or magistrate by whom it was made on proof that the wife had since the making thereof been guilty of adultery. The other Act incorporated with the Summary Jurisdiction (Married Women) Act, 1895, was the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52). By that Act a married woman deserted by her husband might summon him before justices, who were empowered to order that the husband should pay to his wife such weekly sum not exceeding 2*l.* as the justices might consider to be in accordance with his means and with any means which the wife might have for her support and the support of her family. The payment of any sum so ordered was to be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation. The justices by whom the order was made or other justices sitting in their stead might vary the order.

The Summary Jurisdiction (Married Women) Act, 1895, repealed both those enactments, but re-enacted them with slight additions and is for all practical purposes an amalgamation of the two earlier Acts. In *Haddon* v. *Haddon* (1) the husband had been convicted of an aggravated assault on his wife, and justices had made an order under s. 4 of the Matrimonial Causes Act, 1878, that she should be no longer bound to cohabit with him and that he should pay her a weekly sum. The parties

(1) 18 Q. B. D. 778.

subsequently resumed cohabitation for a time, after which the wife again left her husband. It was held that the order was annulled by the return to cohabitation and that sums accruing after that could not be recovered. The same was held under the Act in question in *Williams* v. *Williams*. (1) The order for payment of money is merely accessory to an order of separation.

Secondly, even supposing the order for weekly payments was not annulled by the return to cohabitation, yet the order for imprisonment is bad. The justices had only power to imprison for non-payment of six months' arrears. By s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), where no time is specially limited for making a complaint or laying an information the complaint must be made or information laid within six calendar months from the time when the matter of the complaint or information arose. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which is to be read as one with the Act of 1848, applies to the levying of sums adjudged to be paid by an order which is enforceable as an order of affiliation and to the imprisonment of a defendant for non-payment of such sums. By s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, the payment of any sum of money directed to be paid by any order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. It follows that no more than six months' arrears of the weekly payments could be recovered, and that the order of imprisonment was void.

Willington, for the respondent. On the main point the justices came to a right conclusion, although strictly speaking they ought to have rejected evidence of the return to cohabitation. The Summary Jurisdiction (Married Women) Act, 1895, has by s. 7 provided machinery for varying or discharging orders made under the Act. "Upon cause being shown upon fresh evidence" on the application of the married woman or her husband "a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any order under this Act . . . . has been made" may alter, vary, or discharge the order; further, "if any married woman upon whose

(1) [1904] P. 145.

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application an order shall have been made under this Act . . . . shall voluntarily resume cohabitation with her husband . . . . such order shall upon proof thereof be discharged." That is to say, the order is to be discharged as in the section provided, namely, upon the application of the husband to the Court in the district in which the order was made. Under the earlier legislation there was no machinery provided for discharging a separation order. Such an order having "the force and effect in all respects of a decree of judicial separation on the ground of cruelty" was by law liable to be annulled by the mere fact of a return to cohabitation. An order for payment of money was held to be merely accessory to a separation order and so was liable to be annulled for the same reasons. That was the effect of *Haddon* v. *Haddon*. (1) By the Act of 1895 this has been altered: first a separation order has not now "the force and effect in all respects of a decree of judicial separation on the ground of cruelty" as it had under the Act of 1878; by s. 5 of the Act of 1895 it has the effect of a decree of judicial separation "while in force," that is to say, until discharged as provided for by s. 7. Moreover it is now a mistake to suppose that an order for the payment of money is merely accessory to a separation order. Where, as in the present case, the matter of complaint is desertion, it is not usual or proper, unless the wife insists upon it, to make a separation order: *Dodd* v. *Dodd* (2); *Harriman* v. *Harriman*. (3) The order for payment of money stands on a basis of its own; it is not discharged ipso facto by a return to cohabitation, but remains in force until it is discharged by order of a Court, and the Court must be one in the district in which the original order was made. Therefore, on this application to imprison the appellant, the return to cohabitation was nihil ad rem; its only importance was as a ground for an application to discharge the order for payment of the weekly sums, an application which might have been but never has been made to the stipendiary magistrate who made the order.

Secondly, as to the amount of arrears for non-payment of which the appellant was committed, s. 9 of the Act of 1895 only applies to the means of enforcing an order for payment of money.

(1) 18 Q. B. D. 778. (2) [1906] P. 189.
(3) [1909] P. 123.

Such an order may be enforced as payment of money is enforced under an order of affiliation, that is, as provided by s. 4 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), by distress or, in default of distress, by committal if "any sum to be paid in pursuance of any such order" or "the sums due under such order" or "the sum so appearing to be due" are or is not paid. Nothing in that section or in the Act of 1895 limits the amount recoverable to six months' arrears. The Act creating the right is the proper Act to impose a limitation upon the right, and the limitation must be clear and express. When applying s. 54 of the Summary Jurisdiction Act, 1879, to the levying of sums adjudged to be paid by an order enforceable as an order of affiliation and to the imprisonment of a defendant for non-payment of such sums, it was never intended to limit the amount recoverable, but merely to prescribe the procedure for recovering what was due.

Martin in reply. On the main point the argument of the respondent would lead to the absurd result that even after the parties have permanently returned to cohabitation the husband may remain liable to make the weekly payments ordered. This is to ignore completely the origin and object of these payments. They fulfil the object of an annuity under a separation deed which ceases to be payable ipso facto on a return to cohabitation: *Need* v. *Need* (1) unless it is intended as a permanent settlement on the wife: *Crouch* v. *Waller* (2). The matter is concluded by *Williams* v. *Williams* (3), which was decided on this very Act of 1895.

LORD ALVERSTONE C.J. In my opinion this order cannot be enforced. The sum of 97*l.* 4s. was made up of three years' arrears of the weekly sums of 12s. due under the amending order of February 13, 1905. On failure to pay any one of these weekly sums the defendant could have been brought before the justices on a warrant on the information and complaint of the respondent. The order for the payments having been made under the Summary Jurisdiction (Married Women)

(1) (1886) 31 Ch. D. 524. (2) (1859) 4 De G. & J. 302.
(3) [1904] P. 145.

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Act, 1895, the question is, does the six months' limit prescribed by s. 11 of the Summary Jurisdiction Act, 1848, apply? In my opinion it does. By s. 54 of the Summary Jurisdiction Act, 1879, that Act is to apply to the levying of sums adjudged to be paid by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order so enforceable were a conviction on information. The Act of 1879 therefore applies not only to the levying of sums adjudged to be paid, but also to imprisonment for non-payment. Sect. 54 further provides that the Act is to be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of the Acts and subject to the exceptions specified in s. 35 of the earlier Act. Now by s. 8 of the Summary Jurisdiction (Married Women) Act, 1895, all applications under that Act are to be made in accordance with the Summary Jurisdiction Acts, and by s. 9 of the Act the payment of any sum of money directed to be paid by any order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. Those sections introduce into proceedings under the Act of 1895 the provisions of the Summary Jurisdiction Acts and particularly the Acts of 1879 and 1848. Then as to the enforcing of an order of affiliation s. 4 of the Bastardy Laws Amendment Act, 1872, provides that the justices may make an order on the putative father for the payment of a sum of money weekly, and if at any time after the expiration of a month from the making of such an order it be made to appear to a justice that "any sum to be paid in pursuance of such order" has not been paid, the justice may by warrant cause the putative father to appear before two justices, who, in case he neglects or refuses to pay "the sums due from him under such order," may direct "the sum so appearing to be due" to be recovered by distress, or in certain circumstances by imprisonment for a term not exceeding three months unless "such sum" and costs be sooner paid and satisfied. That enactment limits no time within which it may be made to appear to a justice that "any sum to be paid" has not been paid, and by the use of such words as "any sum to be paid in pursuance of such order," "the sums due from him

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under such order," and the like, seems to indicate that arrears accruing from any date may be recovered by the process prescribed. Now apply s. 54 of the Summary Jurisdiction Act, 1879, reading it as one with the Act of 1848. By s. 11 of the Act of 1848, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." By s. 54 of the Act of 1879 that enactment applies to the levying of sums adjudged to be paid by an order enforceable as an order of affiliation and to the imprisonment of a defendant for non-payment of such sums. By s. 9 of the Act of 1895 the order in question for payment of the weekly sums was an order which may be enforced in the same manner as the payment of money is enforced under an order of affiliation. Therefore it was subject to the limit of six calendar months imposed by s. 11 of the Act of 1848. The imprisonment being for non-payment of three years' arrears was therefore bad. It is true that this point was not taken before the justices, but it appears on the face of the special case as stated, and therefore it is open to the appellant. In my opinion it is a good point, and the appeal must therefore be allowed.

We ought, however, to express our view upon the question raised before the justices. The respondent contended that as soon as it was proved in any proceeding that there had been a resumption of cohabitation, or an act of adultery, an order made under the Summary Jurisdiction (Married Women) Act, 1895, must be discharged. This, it was argued, is the effect of s. 7 of the Act. In my opinion that is not the effect of the section; and I base my decision upon the wording of the section itself. The words are: "A Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them," — i.e., the Matrimonial Causes Act, 1878, and the Married Women (Maintenance in Case of Desertion) Act, 1886 — "has been made, may, on the application

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of the married woman or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds." That was an enactment in somewhat different terms from those of the previous legislation, the object being to enable a Court of summary jurisdiction to deal with orders made under the earlier Acts or this Act. The section continues in these words: "If any married woman upon whose application an order shall have been made under this Act or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." By that enactment a discretion is given in certain circumstances to vary an order made under the Act, and that discretion is given to a Court of summary jurisdiction in the district in which the order was made. In certain other circumstances there is no discretion; the order shall upon proof thereof be discharged, that is to say, on an application made under the earlier part of the section. That is the machinery provided for altering or discharging an order. Sect. 5 provides that a provision that the applicant be no longer bound to cohabit with her husband, which is the basis of the order under s. 5 (*c*) for weekly payments, "while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty." In my view the words "while in force" mean until discharged by the tribunal which has power to discharge it, that is to say, the Court in the district where it was made. The order in question not having been so discharged and being therefore in force, the justices might have made an order for imprisonment of the appellant for non-payment of six months' arrears; but as the order was for non-payment of three years' arrears it was invalid, and the appeal must therefore be allowed.

PICKFORD J. The appellant, having been brought up before justices at Brentford on a warrant for neglecting or refusing to

make weekly payments under an order of a Court of summary jurisdiction made in pursuance of the Summary Jurisdiction (Married Women) Act, 1895, was committed to prison by the justices. Two objections were taken to the committal: first, that the wife having been found by the Brentford justices to have resumed cohabitation before the arrears began to run, the order for the weekly payments had from that date ipso facto ceased to have any validity: secondly, that in any event the appellant could only be committed in respect of six months' arrears. The special case states that an order had been made by the stipendiary magistrate of Lambeth that the appellant should pay the respondent a weekly sum: but probably the order also provided that the respondent should be no longer bound to cohabit with her husband, the appellant, and was in fact a separation order, the weekly payments being merely accessory to the order for separation. The order was made under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895. The appellant contends that as the respondent was found by the justices of Brentford to have resumed cohabitation, that order came to an end. For that proposition the cases of *Haddon* v. *Haddon* (1) and *Williams* v. *Williams* (2) are said to be decisive. If this case had arisen under s. 4 of the Matrimonial Causes Act, 1878, *Haddon* v. *Haddon* (1) would have been conclusive. That case decided that a separation order made under that enactment did come to an end on proof of resumption of cohabitation: and if the wording of s. 5 of the Act of 1895 were substantially the same as that of s. 4 of the Act of 1878, that case would still be conclusive. But the language of those two enactments is not substantially the same. In *Haddon* v. *Haddon* (1) two arguments were urged in favour of the conclusion that the order was annulled by reason of the subsequent resumption of cohabitation: first, the wording of s. 4 of the Act of 1878 that a separation order under that Act should "have the force and effect in all respects of a decree of judicial separation on the ground of cruelty," and secondly, that no power was given by that Act to vary or discharge a separation order, although there was power to vary an order for the payment of a weekly sum, and that consequently separation orders were left with the same force

(1) 18 Q. B. D. 778. (2) [1904] P. 145.

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and effect as a decree of judicial separation on the ground of cruelty. As such a decree ceased to be binding if the parties resumed cohabitation, so it was said a separation order became invalid in the same circumstances. Both these points are met by the alteration of the language in s. 5 of the Act of 1895. Instead of enacting that a separation order "shall have the force and effect in all respects of a decree of judicial separation" the Act of 1895 enacts that the provision "while in force shall have the effect in all respects of a decree of judicial separation." Then by s. 7 of the Act express power is given to the Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which the original order was made to alter or discharge any such order. Having enacted that, the section goes on to provide that if any married woman upon whose application an order has been made shall voluntarily resume cohabitation with her husband, such order shall upon proof thereof be discharged. It seems to me that care was taken by the Legislature to meet both the arguments which prevailed in *Haddon* v. *Haddon*. (1) The order for payment remained in force until it was discharged by a new order and did not come to an end automatically on resumption of cohabitation. It was therefore in force when the matter came before the Brentford justices and they had no power to treat it as at an end. As to whether on proof of a return to cohabitation the order should be discharged as from the date of the return or from the date of proof, I say nothing. The case of *Ruther* v. *Ruther* (2) seems to indicate that the order should be discharged as from the later date. But I refrain from expressing any decided opinion on this point.

As to the period of limitation I feel considerable doubt, but on the whole I agree with the view expressed by my Lord.

AVORY J. I agree with my Lord as to the limitation of time imposed by the combined operation of the Summary Jurisdiction Act, 1879, s. 54, and the Summary Jurisdiction Act, 1848, s. 11. An application was made to imprison the appellant for non-payment of weekly sums ordered to be paid under the Summary

(1) 18 Q. B. D. 778. (2) [1903] 2 K. B. 270.

Jurisdiction (Married Women) Act, 1895. Such orders are by s. 9 of the Act of 1895 to be enforced in the same manner as the payment of money is enforced under an order of affiliation. In my opinion the effect of s. 11 of the Summary Jurisdiction Act, 1848, prevents an order being made in respect to more than six months' arrears, and consequently the order in the present case in respect to three years' arrears is bad.

On the other point, if it were necessary to decide it, I should respectfully differ from my Lord and my brother Pickford. I do not doubt that under s. 7 an application may be made to discharge an order made under s. 5, but that does not conclude the matter. The point arises on the last paragraph in s. 7: "If any married woman upon whose application an order shall have been made under this Act . . . . shall voluntarily resume cohabitation with her husband . . . . such order shall upon proof thereof be discharged"; that is to say in my view, discharged as from the date of the resumption of cohabitation. The respondent must shew that the justices were bound to enforce the order for payment of the weekly sums, but it was the duty of the justices on proof of the fact that the parties had resumed cohabitation to apply the law stated in *Williams* v. *Williams*. (1) In that case the Court had to consider the effect of this same Act of 1895. Sir F. Jeune, President of the Probate Division, said: "The effect of the condonation was to put an end to the cause of complaint—not by virtue of the Act, but by force of law. The principle acted on by judges of this Court, and, in the Ecclesiastical Courts, by our predecessors, that the moment you find a resumption of cohabitation there is an end of any previous desertion, is founded on or has been recognized by the Courts of common law"; and Gorell Barnes J. said: "That provision"—i.e., the last clause in s. 7 of the Act of 1895—"is really based on the principle that by resuming cohabitation the married woman condones and puts an end to the cause of complaint. Therefore, if it is shewn that the parties have voluntarily resumed cohabitation, that puts an end to any cause of complaint which the one party had or may have had against the other." I think the justices ought to have applied that law and have refused on that

(1) [1904] P. 145.

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ground to commit the appellant. But as it is unnecessary to decide the point I give no final opinion upon it.

Appeal allowed.

Solicitors for appellant: *Hepsley C. Duckworth & Co., Brentford.*

Solicitor for respondent: *Wilfrid Firth, Brentford.*

NOTE.—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4: "Any married woman whose husband . . . . shall have deserted her . . . . may apply to any Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which . . . . the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act . . . ."

Sect. 5. "The Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

"(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

"(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant:

"(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable:

"(*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit."

Sect. 7. "A Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act . . . . has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act . . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

Sect. 8. "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts . . . ."

Sect. 9. "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

By s. 3 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), any single woman who may be with child or who may be delivered of a bastard child may in certain circumstances make application to a justice of the peace for a summons to be served on the man alleged by her to be the father of such child. The justice of the peace shall thereupon issue his summons to the person to appear at a petty session.

By s. 4 the justices in such petty session after hearing evidence as therein prescribed may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, proceed to make an order on the putative father for the payment of a sum of money weekly, not exceeding five shillings a week, for the maintenance and education of the child. "If at any time after the expiration of one calendar month from the making of such order as aforesaid it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of any such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . . such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due . . . . to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give security, by way of recognizance or otherwise, to the satisfaction of such justices, for his appearance before two justices on the day which may be appointed for the return of such warrant of distress . . . .; but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction . . . . there to remain, without bail or mainprize, for any term not exceeding three calendar months unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied."

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 54: "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, ...

"This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenor of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in section 35 of the Summary Jurisdiction Act, 1848."

Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11: "In all cases where no time is already or shall hereafter be specially limited for making

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any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

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Nov. 29, 30; *Dec.* 1.

[IN THE COURT OF APPEAL.]

BAKER AND OTHERS *v.* INGALL.

Trade Union—Agreement embodying Substance of Rules—Agreement concerning Conditions of Employment—Agreement for Application of Funds to provide Benefit—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

By s. 4 of the Trade Union Act, 1871, it is enacted that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing (3.) any agreement for the application of the funds of a trade union to provide benefits to members.

The defendant was a member of a friendly society registered under the Trade Union Acts, 1871 and 1876. By one of the rules of the society a member meeting with an accident and becoming totally incapacitated from following his employment for the remainder of his life was entitled to receive the sum of 100*l.*; and all members receiving such a benefit were obliged to sign an agreement that in the event of their returning to their trade they would refund to the society the amount of accident benefit received. If a member failed to refund, certain officers of the society were empowered to institute legal proceedings for the recovery of the amount received.

The defendant, having met with an accident and being apparently incapacitated for life from following his employment of a moulder in an iron foundry, made a claim and received from the society a sum of 100*l.* On receipt of that sum he signed an agreement that in case he should at any time thereafter resume work as an ironfounder he would forthwith repay to the society the sum of 100*l.*, and that, in case that sum was not repaid within a named period, certain officers of the society should have power to sue and proceed against him in any Court of competent jurisdiction for the said sum.

The defendant was able to resume and did resume work as an ironfounder within the meaning of the agreement. In an action by the officers of the society against the defendant to recover the sum of 100*l.* under the agreement:—

Held by Vaughan Williams L.J. and Buckley L.J. (Kennedy L.J. dissenting), that the action was brought directly to enforce an agreement for the application of the funds of the trade union to provide a benefit

to a member within the meaning of s. 4 of the Trade Union Act, 1871, and was therefore not maintainable.

Decision of Divisional Court (Phillimore and Bankes JJ.) [1911] 2 K. B. 132, reversed.

APPEAL from the decision of a Divisional Court (Phillimore and Bankes JJ.) upon the hearing of an appeal from the county court of Yorkshire holden at Sheffield; reported [1911] 2 K. B. 132.

The plaintiffs were John Thomas Baker, the president, William Matthew Lawson, the secretary, and Thomas William Toseland, the late president, of the Friendly Society of Ironfounders of England, Ireland, and Wales, a trade union registered under the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31 and 39 & 40 Vict. c. 22). They sued on behalf of themselves and all other the members of the society.

The defendant was a moulder in an iron foundry and a member of the society.

The rules of the society contained the following provisions:

Rule 25.—1. "Any twelve-months' member owing not more than twelve weeks' contributions meeting with an accident and thereby losing or disabling a limb, or suffering from bodily ailment . . . . not caused by old age, but the result of an accident to a previously healthy organ, and who in consequence is totally incapacitated from following his employment as a metal founder or general core maker for the remainder of his life, shall, if not disentitled according to rule, receive the sum of 100*l*. . . . ."

6. "All members receiving the accident benefit must sign an agreement that in the event of their returning to the trade they shall refund to the society the amount of accident benefit received . . . ." On failure by a member to refund under this sub-rule the council of the society were empowered to institute legal proceedings for the recovery of the amount received by the member.

On June 18, 1906, the defendant, being a twelve-months' member and not owing twelve weeks' contributions, met with a severe accident while at his work and was to all appearances totally incapacitated from following his employment for the

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remainder of his life. He made a claim upon the society under rule 25, sub-rule 1, and received a sum of 100*l.*, and signed an agreement in pursuance of sub-rule 6.

This agreement was dated August 29, 1907, and was made between the defendant of the one part and Thomas W. Tozeland and Joseph Maddison, being the president and corresponding secretary for the time being of the society, of the other part. It recited rule 25, sub-rules 1 and 6, and, after further reciting that the defendant being a member of the society had represented to the society that he had been rendered permanently unable to follow his trade as an ironfounder through accident and had produced to the executive committee of the society satisfactory testimony of permanent disablement, and reciting finally that the sum of 100*l.* had on the signing of the agreement been paid to the defendant out of the funds of the society in pursuance of rule 25 and that the defendant acknowledged and declared that he had received the said sum of 100*l.* in full satisfaction and discharge of all benefits which he might claim under any of the rules of the society, continued as follows:—"Now these presents witness that in further pursuance of the said rule and in consideration of the premises the said Henry Ingall . . . . hereby agrees with" the parties of the second part "that in case the said Henry Ingall shall at any time hereafter resume work as an ironfounder the said Henry Ingall . . . . shall forthwith repay to the said society the sum of 100*l.* sterling so paid to him as aforesaid without any deduction or abatement whatsoever and that any earning of money by the said Henry Ingall in any department of the trade of an ironfounder shall be deemed a resumption of work for the purposes of this agreement And that in case the said sum of 100*l.* sterling shall not be repaid to the said society by the said Henry Ingall . . . . within one month after his resuming work as aforesaid it shall be lawful for the said" parties of the second part "or for either of them . . . . to sue and proceed against the said Henry Ingall . . . . upon this agreement in any Court of competent jurisdiction for the said sum of 100*l.* sterling or for so much thereof as may remain unpaid for the time being as for money had and received to the use of the plaintiffs or plaintiff And that it shall be no answer to any such proceeding that the

said sum of 100*l.* sterling was partnership money or that the rules of the said society were in restraint of trade And the said Henry Ingall shall not demur to deny or put in question the right of the plaintiffs or plaintiff to sue for and recover the said sum of 100*l.* sterling And that for the purpose of any such proceedings it shall not be necessary to prove the said rules or the appointment of the plaintiffs or plaintiff or either of them or of the persons or person through whom they or either of them claim or claims title as president or corresponding secretary of the said society respectively except by the production of the minute book of the said society In witness &c."

An unexpected improvement took place in the condition of the defendant, and in March, 1910, he was able to resume work in a foundry, not as a moulder, but as a core maker, at lower wages.

This action was thereupon brought in the Sheffield County Court by the president and secretary for the time being and the late president of the society suing on behalf of themselves and all other the members of the society. The claim was for 100*l.* payable by the defendant under the terms of the agreement of August 29, 1907.

The defendant contended that he had not resumed work as an ironfounder within the meaning of the agreement. He further contended that the agreement could not be enforced in a Court of law on the ground that it was, within the meaning of s. 4 of the Trade Union Act, 1871 (1), first, an agreement between members of a trade union as such, concerning the conditions on

(1) The Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4:

"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union:

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members; . . . .

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

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which a member should be employed; secondly, an agreement for the payment of a penalty to a trade union; and, thirdly, an agreement for the application of the funds of a trade union to provide a benefit to a member.

The county court judge held that the defendant had resumed work as an ironfounder within the meaning of the agreement. He then reviewed the rules of the society and came to the conclusion that they constituted the society an unlawful association at common law, and consequently that if the agreement came within s. 4 of the Trade Union Act, 1871, the action was not maintainable. As to the effect of that enactment, he held that the agreement was not one concerning the conditions on which a member should be employed, but that it was an agreement for the payment of a penalty, and also that it was an agreement for the application of the funds of a trade union to provide a benefit to a member. He therefore gave judgment for the defendant.

The plaintiffs appealed.

The Divisional Court held that the agreement was neither (1.) an agreement concerning the conditions on which a member of a trade union should be employed, nor (2.) an agreement for the payment of a penalty, nor (3.) an agreement for the application of the funds of a trade union to provide a benefit to a member within the meaning of s. 4 of the Act; they held, therefore, that the action was maintainable.

The defendant appealed.

Spencer Bower, K.C., and *Arthur Page*, for the appellant. The question whether this society is an unlawful association at common law is not open to argument after the decision in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1); and being an unlawful association at common law it cannot maintain an action upon this agreement, if it is an agreement coming within s. 4 of the Trade Union Act, 1871. This is an action for the purpose of "directly enforcing . . . . an agreement for the application of the funds of a trade union to provide benefits to members." Reading the agreement as a whole, it is clear that the complete agreement between the parties

(1) [1910] 1 K. B. 506.

is contained in the document and in the rules taken together, and it is impossible to read the document, especially the commencement of the operative part, without seeing that it derives its vitality from the rules. An agreement so contained in the rules is clearly an agreement to provide benefits to members: it is an agreement to provide 100*l.* for a member on condition of repayment of the money in a certain event, and the action is one to directly enforce a term of the agreement.

Danckwerts, K.C., and *H. T. Weddy*, for the respondents. The agreement is not one for the application of the funds of a trade union to provide benefits to members. To hold that it is so is to confuse the agreement of August 29, 1907, with the agreement contained in rule 25 of the society's rules; but the two are separate and distinct. The agreement of August 29, 1907, constitutes the performance of the agreement contained in rule 25, and the agreement to repay has nothing to do with providing any benefit. In *Wilkie* v. *Kerr* (1) this question was decided in this way. The rule of construction to be applied is thus stated by Parke B. in *Ford* v. *Beech* (2): "In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." It is clear upon this agreement that the intention of the parties was that it should be an agreement separate from and independent of the rules, and which the society should be entitled to enforce by action if necessary. The rights of the parties are regulated entirely by the agreement and not by the rules. It is admitted that the question whether the society was an illegal association at common law cannot be argued after the decision in *Russell* v. *Amalgamated Society of Carpenters and Joiners*. (3)

Spencer Bower, K.C., in reply.

Cur. adv. vult.

(1) 1911 S. C. 1310. (2) (1848) 11 Q. B. 852, 886.
(3) [1910] 1 K. B. 506.

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1911. Dec. 1. VAUGHAN WILLIAMS L.J. It is admitted that this case is covered by the decision of this Court in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1), and therefore it cannot be contended in this Court by the plaintiffs that the Friendly Society of Ironfounders is not an unlawful association at common law. But this does not, of course, affect the right of the society to raise the point, if necessary, in the House of Lords. Consequently, if the agreement which we are considering falls within s. 4 of the Trade Union Act, 1871, this action is not maintainable. That section runs thus: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, 1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: 2. Any agreement for the payment by any person of any subscription or penalty to a trade union: 3. Any agreement for the application of the funds of a trade union,—(*a*) To provide benefits to members; or (*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or (*c*) To discharge any fine imposed upon any person by sentence of a Court of justice; or, 4. Any agreement made between one trade union and another; or, 5. Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

In the view which I take of the present case I have only to refer to s. 4, sub-s. 3, that is, the clause dealing with benefits to members. I have come to the conclusion that the agreement here in question is an agreement for the application of the funds of a trade union to provide a benefit to a member. It is contended that the agreement contained in rule 25 of the society is quite separate and distinct from the agreement of August 29, 1907. Phillimore and Bankes JJ. have so held in the Divisional Court,

(1) [1910] 1 K. B. 506.

and this is an appeal from their decision. Phillimore J. says in his judgment (1): "It may be that there is in these rules an agreement for the application of the funds of the trade union to provide benefits to members, and the defendant could not have enforced the payment of this 100*l.* because such an agreement would be struck at by s. 4, sub-s. 3 (a). But if so, the benefit which the defendant has agreed to get, and the trade union has agreed to give him, and which cannot be enforced by action, is a conditional gift of 100*l.*, and the agreement for the application of the funds of the trade union has been performed when that conditional gift has been made and the necessary instrument for establishing that conditional gift has been executed. After that any rights which arise under that instrument are not rights which are to be enforced as part of the agreement for the application of the funds of the trade union." And Bankes J. says (2): "It is clear that s. 4, sub-s. 3, of the Act of 1871 applies to all agreements between the society and its members with regard to benefits to which the members are entitled under the rules, because these agreements are clearly agreements for the application of the funds of the trade union to provide benefits to its members. The present case raises a question as to the construction of rule 25, sub-rules 1 and 6. The agreement constituted by the rules is a promise that the society on its part will in certain events grant a conditional benefit to a member who brings himself within sub-rule 1 of rule 25, and a promise by the member on his part that he will, as a condition of receiving the benefit, enter into an agreement to repay the benefit in certain events. Now, in so far as those two sub-rules constitute an agreement between the society and the member, I think that the agreement, being one for the application of the funds of a trade union to provide a benefit to its member, could not be sued upon. But that is not the question here. The question we have to decide is whether the agreement which the member has, in pursuance of his promise contained in sub-rule 6, entered into, is a separate and independent agreement, or whether it is merely a part or a term of the original agreement contained in rule 25, in which case it could not be enforced in a Court of

(1) [1911] 2 K. B. at p. 140. (2) [1911] 2 K. B. at p. 142.

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law. In my opinion it is a separate and distinct agreement, the result, and not a part, of the original agreement. That being so, I am at liberty to construe the document of August, 1907, as a separate agreement, and doing so I come to the conclusion that this is not an agreement for the application of the funds of a trade union to provide a benefit to a member, and consequently that there is nothing to prevent it from being enforceable in a Court of law."

I cannot agree that the agreement of August 29, 1907, which the member has signed in pursuance of his promise contained in rule 25, sub-rule 6, is a separate and independent agreement; it is, I think, merely a part or a term of the original agreement contained in rule 25; and, if that is so, both the learned judges held that it was not enforceable in a Court of law: that is, indeed, common ground between us.

I now read the material portions of rule 25. Sub-rule 1 runs thus: "Accident benefit. Any twelve-months' member owing not more than twelve weeks' contributions meeting with an accident, and thereby losing or disabling a limb, or suffering from bodily ailment, imperfect vision or blindness, not caused by old age, but the result of an accident to a previously healthy organ, and who, in consequence, is totally incapacitated from following his employment as a metal founder or general core maker for the remainder of his life, shall, if not disentitled according to rule, receive the sum of one hundred pounds." Passing over sub-rule 2, I come to sub-rule 3, which says: "Any member desiring to claim the accident benefit shall inform his branch secretary, who must bring the application before the next quarterly meeting, and if, after making the fullest inquiries, the branch is satisfied of the justice of the claim, they shall forward their report to the council for their consideration and decision." The next that I need read is sub-rule 6, which says: "All members receiving the accident benefit must sign an agreement that, in the event of their returning to the trade, they shall refund to the society the amount of accident benefit received. Failing to do so, the council shall be empowered to institute legal proceedings for recovery."

In my opinion this rule 25, apart from any illegality in the society, and from the provisions of the Trade Union Act, to

which I have already referred, would give to a member and to the society respectively rights which could be enforced by the one against the other. The agreement is entirely one agreement; every recital must be taken into consideration, and if an action is brought to enforce any part of it, it is an action brought to enforce an agreement for the application of the funds of the trade union and in particular an agreement for the application of trade union funds to provide benefits to members in pursuance of rule 25. That rule is headed "Accident benefit." I think it is impossible to divide the agreement into two parts and to treat the action as brought on the agreement to refund. I do not say that the agreement is unlawful, but I do say that it falls within s. 4, sub-s. 3, of the Trade Union Act, 1871—that is, it is an agreement for the application of the funds of a trade union to provide benefits for its members, and is therefore within the words "Nothing in this Act shall enable any Court to entertain any proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements" that is, in the present case, the agreement mentioned in sub-s. 3 (a). I cannot accept the argument based upon the use of the word "for" in the passage in s. 4 which I have just quoted, nor do I think that, in giving the construction which I have done to the agreement sued upon, I am in any way departing from the canon of construction laid down by Parke B. in *Ford* v. *Beech*. (1)

I propose now to read such parts of the agreement as I think ought to be read. It begins with the recital: "Whereas by the 25th rule of the said society it is provided that subject to certain conditions any free or twelve-months' member meeting with an accident and thereby losing." &c. Then it recites sub-rule 6: "And whereas it is provided by clause 6 of the said rule that members receiving the allowance under either scale of the accident benefit shall sign an agreement whereby if they resume their occupation as tradesmen they shall in that case refund to the said society the whole amount received, and if necessary legal proceedings shall be taken to recover the same." Those words are important. Then the agreement proceeds

(1) 11 Q. B. 852

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"And whereas the said Henry Ingall, being a member of the said society, has represented to the said society that he has been rendered permanently unable to follow his trade as an ironfounder through accident and has produced to the executive committee of the said society satisfactory testimony of such permanent disablement; and whereas the sum of one hundred pounds sterling has been on the signing of this agreement paid to the said Henry Ingall out of the funds of the said society in pursuance of the [twenty-fifth] rule of the said society and the said Henry Ingall hereby acknowledges and declares that he has received the said sum of one hundred pounds sterling in full for all benefits which he might claim under any of the rules of the said society Now these presents witness that in further pursuance of the said rule and in consideration of the premises the said Henry Ingall for himself, his heirs, executors, and administrators hereby agrees with the said Thomas Tozeland and Joseph Maddison, and with each of them, and with the executors, administrators, successors and assigns of them, and each of them, that in case the said Henry Ingall shall at any time hereafter resume work as an ironfounder the said Henry Ingall, his executors or administrators, shall forthwith repay to the said society the sum of one hundred pounds sterling so paid to him as aforesaid, without any deduction or abatement whatsoever, and that any earning of money by the said Henry Ingall in any department of the trade of an ironfounder shall be deemed a resumption of work for the purposes of this agreement. And that in case the said sum of one hundred pounds sterling shall not be repaid to the said society by the said Henry Ingall, his executors or administrators, within one month after his resuming work as aforesaid, it shall be lawful for the said Thomas W. Tozeland and Joseph Maddison, or for either of them, or for the executors, administrators, successors or assigns of them, or either of them, or for the president and corresponding secretary of the said society for the time being, or for either of them to sue and proceed against the said Henry Ingall, his executors or administrators, upon this agreement in any Court of competent jurisdiction for the said sum of one hundred pounds sterling, or for so much thereof as may remain unpaid for the time being." I think that beyond that I need

only read this: "And that it shall be no answer to any such proceedings that the said sum of one hundred pounds sterling was partnership money, or that the rules of the said society were in restraint of trade, and the said Henry Ingall shall not demur to deny or put in question the right of the plaintiffs or plaintiff to sue for and recover the said sum of one hundred pounds sterling. And that for the purpose of such proceedings it shall not be necessary to prove the said rules, or the appointment of the plaintiffs or plaintiff, or either of them, or the persons or person through whom they or either of them claim or claims title as president or corresponding secretary of the said society respectively, excepting the production of the minute book of the said society." There is the agreement. I have already explained my view of this matter and can only say once again that in my judgment this is one single agreement which cannot be divided; and, treating it as one agreement, if there is any clause in it on which the society is desirous of bringing an action, they will be prevented from bringing that action, because this agreement as a whole falls within s. 4, sub-s. 3, of the Trade Union Act, 1871. I think that this appeal must be allowed.

BUCKLEY L.J. On the question whether this society is one which is illegal at common law as having purposes in restraint of trade, it is admitted by the respondents, the society, that the question is in this Court concluded by authority, though it is open to the respondents in the House of Lords. My judgment proceeds upon the footing that this society is a trade union illegal at common law having the benefit of ss. 2 and 3 of the Trade Union Act, 1871, subject to the qualifications and restrictions imposed by s. 4 of that Act. Mr. Ewer indicated, though he did not develop another point, that the society may be illegal upon grounds other than those addressed to the question of a trade union. It was unnecessary to develop this argument, having regard to what is stated above. The question for our decision is this: This being a society illegal at common law as having purposes in restraint of trade is this an action to enforce an agreement as to benefits within s. 4 of the Act? If it be, it is not maintainable. I think that it is, for that it falls under

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s. 4, sub-s. 3 (*a*). Sect. 4 provides that "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing . . . . (3.) Any agreement for the application of the funds of a trade union (*a*) To provide benefits to members." If an agreement be entered into between two parties containing (let us say) four terms, the first two binding on the one party and the other two binding on the other party, and if three of those terms are performed and the fourth is not, an action to enforce the fourth term is in my opinion an action directly to enforce that agreement. The points to be considered here are two—first, whether this is an action to enforce an agreement in that sense, and, secondly, whether the agreement is not one but two, and whether one part of it is a separate and independent agreement which has nothing to do with s. 4. As to the former of these, suppose an agreement to be entered into between a society of this kind and a member to this effect: that under circumstances the member shall be entitled to receive 100*l.* to be expended within twelve months in building or buying a house, and if not so expended within that time then to be refunded. Suppose that the money was advanced but the house was not built or bought; an action to enforce the return of that money would be an action to enforce that agreement, and that agreement would in my opinion be one for the application of the funds of a trade union to provide benefits to its members. It would be an agreement to provide a benefit upon the terms that the member on his part assumed a certain obligation to the society. It would be an agreement under which the funds were, under circumstances, to be paid to a certain person upon the terms that they should be his in one event, but should again become the society's funds in another event. The funds are parted with, and are, in the language of the agreement, to be refunded. In my opinion the whole of that agreement would be an agreement for the application of the funds to provide benefits.

But the agreement with which we are here dealing is no doubt not exactly of that kind. Passing to the rules, their effect in my judgment is this. Under rule 25 the defendant, in an event which happened, was entitled to receive 100*l.* upon certain terms.

These terms include clause 6 of rule 25. Clause 6 had this effect: that, if the man received the 100*l.*, he was bound to sign an agreement (in this case the agreement of August 29, 1907); and then clause 6 goes on: "Failing to do so, the council shall be empowered to institute legal proceedings for recovery." I understand that to mean that, on his failing to sign the agreement, the council shall be empowered to take legal proceedings. Therefore under this clause, if the 100*l.* is paid and the man will not sign the agreement, the council can sue him for the 100*l.*, although he is still incapacitated. If he complies with the terms and signs the agreement and subsequently gets well, then the council are again entitled to recover the 100*l.* The rules themselves contain provisions under which in both events, the one that of his remaining incapacitated but refusing to sign the agreement, and the other that of his signing the agreement and ceasing to be incapacitated, the 100*l.* is to be repayable. The rules contain, in my opinion, a complete code under which by virtue of the rules the 100*l.* is to be repayable in each of the contemplated events.

What happened in the present case was this. The man became incapacitated. Two events took place simultaneously: first, the handing over of the money, and, secondly, the signing of the agreement. I get that fact from the agreement itself. The agreement, after reciting the rules and the obligation to sign the agreement to refund, and then stating that the man had represented himself to be incapacitated, says that whereas the 100*l.* has on the signing of this agreement been paid to Ingall, he acknowledges that he has received it in full for all benefits which he is claiming under the rules, and that is expressed to be done in pursuance of rule 25. The consideration for the agreement is expressed thus: "Now, these presents witness that in further pursuance of the said rule, and in consideration of the premises"—that is to say, in order to give effect to the bargain contained in the rules which is to be effectuated by the signing of an agreement, and in consideration of his having had the money, circumstances having happened in which he became entitled to it, he bound himself to pay a certain sum in an event. In my opinion, the whole of that agreement was an agreement for the

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application of the funds of the union to provide a benefit to a member upon terms which included that, in an event, the member should be responsible for the return of the sum of money paid to him.

The other point which requires consideration is as to whether the agreement signed is an agreement separate from the other terms. In my opinion it is not. It is part of one entire bargain. It is true that this part of the bargain is to be evidenced by a separate piece of paper; but that separate piece of paper is not a separate agreement independent of the rest of the agreement; it is but a working out of that agreement and an evidencing of the exact terms which are to be complied with. There is a decision in Scotland, *Wilkie* v. *King* (1), in which the Scottish Court, following the decision of the Divisional Court in the present case, decided to the contrary effect of what I am now holding. Lord Johnston was the dissentient judge, and I confess that I prefer his judgment to that of the other members of the Court. It is true that in that case the rules contained not merely such a rule as rule 25 (6.), but contained another to the effect that members resuming work should be required to refund. So that you have there in express words what I find by implication in the rules before me. But to my mind it is far too narrow to say that a case such as this can be differentiated by the fact that rule 25 (6.), which requires the signature of an agreement to do the thing, is not followed or preceded by another rule which says that the member shall do the thing as to which he is to sign an agreement providing that he will do it. I do not think that the cases can be distinguished on that ground.

I come to the conclusion that here there was an agreement for the application of the funds of the union to provide benefits, one term of which has not been performed, and that this is an action to enforce its performance; that it is therefore an action to enforce such an agreement as is in the statute mentioned, and, having regard to the provisions of the statute, that it is incompetent to the Court to deal with this action, it being, in my opinion, an action directly to enforce that agreement. For these reasons I

(1) 1911 S. C. 1310.

think that this appeal succeeds, and that judgment ought to be entered in the action for the defendant.

KENNEDY L.J. I regret that I am unable to concur in the judgment which has been pronounced by the majority of the Court, but it seems to me that the respondents are right. This is an action brought upon an agreement which in form is under hand only and not under seal. When we come to the enacting part of this agreement, just after the recitals, we find that it says: "These presents witness that in further pursuance of the said rule and in consideration of the premises the said Henry Ingall for himself, his heirs, executors and administrators, hereby agrees with the said Thomas W. Tozeland and Joseph Maddison, and with each of them, and with the executors, administrators, successors and assigns of them and each of them, that in case the said Henry Ingall shall at any time hereafter resume work as an ironfounder, the said Henry Ingall, his executors or administrators, shall forthwith repay to the said society the said sum of one hundred pounds sterling, so paid to him as aforesaid, without any deduction or abatement whatsoever." Then it says what shall be deemed to be a resumption of work, and goes on thus: "That in case the said sum of one hundred pounds sterling shall not be repaid to the said society by the said Henry Ingall, his executors or administrators within one month after his resuming work as aforesaid, it shall be lawful for the said Thomas W. Tozeland and Joseph Maddison, or for either of them, or for the executors, administrators, successors, or assigns of them or either of them, or for the president and corresponding secretary of the said society for the time being, or for either of them, to sue and proceed against the said Henry Ingall, his executors or administrators, upon this agreement in any Court of competent jurisdiction for the said sum of one hundred pounds sterling or for so much thereof as may remain unpaid."

If I am asked as a lawyer what is the effect of that deed, or what is its purpose, object, or scope, I do not think I should be accurate if I said more than this—that it is a document under which Ingall binds himself in certain events to pay the sum of 100*l.* to the society or its officials. It seems to me, with great

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respect to those who are of a different opinion, that to say that I must add to that anything of the matters that are contained in the recitals, is not sound as a matter of the legal construction of documents. Many deeds, of course, contain a large number of recitals; but to say, as the argument on the other side would compel me to say, that a deed forms part of a recited document so far as its legal effect, purpose, object, or scope is concerned, is to my mind not good law. A deed may of course provide in terms that it shall be read with or in subordination to any other document that it mentions, in which case that deed is incorporated in the document. But I know of no legal authority to justify my saying, as must be said if the appeal here is to succeed, that this document is not one to secure this repayment except in so far as such repayment may be justified by some document mentioned in the recitals. Of course it recites the history of the proceedings. It would not have existed but for the rules which made such an agreement possible to enter into and to enforce. But if I am asked what is, in my opinion as a lawyer, the effect, purpose, object, or scope of this deed, I must answer that it is a deed which, after reciting I care not how many documents, says that this document is the title of the present plaintiffs to sue in a certain event for the amount to be recovered. Therefore, with great respect to those who are of a different opinion, I do not think it is correct to say that anything except what is contained in the witnessing part can be read as a part of this document.

We are faced with this question: Are the Courts of law excluded by the statute which is invoked by the appellant? I hope that I am in accord with the authorities in saying that, where a statute is invoked for the purpose of taking away from the parties to a legal document the right to enforce it in a Court of law, I am bound (and not merely entitled) to construe that provision strictly. For example, with respect to the case of *Ford* v. *Beech* (1) and the judgment of Parke B., no one doubts that it is the universal principle that a document ought to receive that construction which its language will admit and which will effectuate the intention of the parties to be gathered from it. I pause here to say, first, that that has no

(1) 11 Q. B. 852.

reference to the construction of a statute, but only to the construction of a voluntary agreement between the parties to it: and, further, that, if I am to look at that which will best effectuate the intention of the parties to be gathered from the whole agreement, I find it to be expressly stated that the person who is now seeking to set aside that agreement, having received 100*l.*, is a person who has bound himself under his hand to an agreement not merely as to his liability, but also as to the right of the other party to sue him in a Court of law. Therefore, if we give to the language that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, that intention is that a Court of law shall be the proper method of enforcing the rights of the parties.

And, as regards this particular piece of legislation, a passage was cited to us from the judgment of Lord Halsbury in *Yorkshire Miners' Association* v. *Howden* (1), in which he says, referring to this very section, "That argument seems to assume that the object of the enactment was to keep the trades unions out of the jurisdiction of the Court altogether. I do not think it does anything of the kind. It recites with great care what the Courts are not to interfere with, and that exemption from their jurisdiction is very precisely limited." Lord Davey, who was one of the minority, said: "Where the primary object of the action is to enforce the agreement, and the right of the plaintiff to maintain the action is founded on his right to have the rules observed, I think that the action must be deemed to be one for directly enforcing the agreement. But where the right of action is of a different character, and the construction and effect of the rules (if it comes in at all) only comes in as evidence in support of the particular relief claimed, I think that the action would not be one for 'directly' enforcing the agreement." If we turn to the words of the statute, the words which are material here,—for the other points of the statute as to penalty have not been argued, and I think quite rightly, because to say that this is a penalty seems to me absurd,—we find that s. 4 of the Trade Union Act, 1871, provides: "Nothing in this Act shall enable any

(1) [1905] A. C. 256.

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Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements." Amongst these agreements, the one we have to consider here is "any agreement for the application of the funds of a trade union to provide benefits to members." Would any lawyer to whom this agreement was handed say that it was an agreement the purpose, object, or scope of which was to provide a benefit to members? I cannot myself come to such a conclusion. That seems to me to be doing what I have never known done—so to alter the agreement as to make the documents recited in it part of the agreement. The action is one to recover a certain sum of money paid to a member on his signing the agreement. I cannot get over that difficulty. Then it is said that the agreement forms a part or term of the rules of the society which are recited. Of course, it forms part in this sense, that the agreement would never have come into existence but for the rules of the society. That is true; but it does not in the case of parties, for example, who are in a particular position, such as trustees with power to do various things, make any mortgage or other contract into which they enter a part of the settlement or other document constituting the trust. I confess that I feel that difficulty, though I suppose that I ought to have been able to get over it owing to the difference of opinion on the part of my colleagues.

I agree with the majority in the Scotch case of *Wilkie* v. *King* (1), and with the views very neatly expressed below by Phillimore and Bankes JJ. Phillimore J. said (2): "But if two people agree that in certain events one shall execute an instrument which will establish certain contractual relations, the original agreement is exhausted when the further instrument is executed, and the right to sue on the contractual relation established by the further instrument exists quite independently of the original agreement which related to the instrument being executed. It may be that there is in these rules an agreement for the application of the funds of the trade union to provide benefits to members, and the defendant could not have enforced the payment of this 100*l.* because such an agreement would be

(1) 1911 S. C. 1310. (2) [1911] 2 K. B. at p. 140.

struck at by s. 4, sub-s. 3 (*a*). But if so, the benefit which the defendant has agreed to get and the trade union has agreed to give him, and which cannot be conferred by action, is a conditional gift of 100*l*., and the agreement for the application of the funds of the trade union has been performed when that conditional gift has been made and the necessary instrument for establishing that conditional gift has been executed. After that any rights which arise under that instrument are not rights which are to be enforced as part of the agreement for the application of the funds of the trade union." I may add something, I hope, to that very clear statement without spoiling it. Could an action, apart from the Act, have been brought on the rules, or anything antecedent to this agreement, by either of the parties? To my mind, it could not: in effect, there is nothing outside this agreement, nothing which can be treated as within s. 4. Then Bankes J. said (1): "The question we have to decide is whether the agreement, which the member has, in pursuance of his promise contained in sub-rule 6, entered into, is a separate and independent agreement, or whether it is merely a part or a term of the original agreement contained in rule 25, in which case it could not be enforced in a Court of law. In my opinion it is a separate and distinct agreement, the result" — and that seems to me to be a sound legal distinction — "and not a part of the original agreement." Therefore, as it was unnecessary in bringing this action for either party to refer to anything but the agreement, it seems to me that it is legally impossible to say that, merely because the document recites previous rules and agreements, or because it could not have come into existence but for the relations created between the parties by the rules, it is so close a part or term of the rule that it can come within the words of the statute.

As I suggested during the argument, the governing words of the statute are the words as to an agreement "for" the application of the funds of the trade union to provide benefits, and in my opinion the effect of the judgment of my learned brethren is to strike out the word "for" as unnecessary. I have had the opportunity of referring to the Gaming Act, 1892, the words of which are "money paid under or in respect of." Had the present

(1) [1911] 2 K. B. at p. 142.

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statute said "any agreement for or in respect of," I could imagine a great difficulty in the way of saying that this agreement was not "in respect of"; but, as Lord Halsbury says, the words are precise, and s. 4 must not be read as if it included anything which does not naturally come within it. As Lord Coleridge C.J. pointed out in *Tatam* v. *Reeve* (1), "in respect of," as used in that statute, differs from "under." He says: "I agree that they" —that is, the sums of money—"were not paid 'under' such a contract or agreement, because there was no contract of betting or gaming between the plaintiff and the defendant; but the money was paid in respect of gaming debts which the defendant owed to the persons to whom the plaintiff paid it." I decline to enlarge the words of the section so as to give it a loose or even a liberal interpretation which shuts out either of the parties from our Courts of law on a perfectly legal agreement; there is no question of illegality in this case, but simply of enforceability under the express provisions of a particular statute—that is to say, to read "for" as if it meant "in respect of" or "in relation to."

It seems to me that the only answer which as a lawyer I can give as to the purpose, object, or scope of this agreement is that it is not an agreement for the application of the funds to benefits, but is a contract, enforceable by the express terms of the agreement itself in a Court of law, to repay, under certain circumstances, the money paid. In my opinion the Act would apply if the question had arisen upon the rule itself, as clearly it might have done. Suppose that the society had refused to pay the 100*l.* under the rules, and the man had been minded to sue for the money and had invoked the rules and claimed payment under them, or that it had gone a step further, and the society had written to him saying that they would pay him the 100*l.*, and he had sued; they would have said that this was an agreement for the application of the funds of the society for the benefits to him and that he could not sue. On the contrary, if he had got this money and they had been seeking to say that they would enforce his obligation under the rules to sign an agreement for repayment of the money in certain events, still an action would be barred, for there would be on their part an attempt to assert the liability or

(1) [1893] 1 Q. B. 44.

the duty created by the rules for not signing the agreement. The Act, therefore, applies to such a case until it has got to what Bankes J. correctly calls the "result"—that is, that the distribution and application are complete; but there is a separate agreement entered into by which nothing is done with regard to the application of the funds, but the sole effect of which is to make the money the subject of a just claim in certain events by the society for repayment.

For these reasons I think that the judgment of the Court below was right both in principle and in application, and that the agreement is the result, and not merely a part or term of anything which was an agreement for the application of the funds of the trade union for the purpose stated in the restricting clause of the Act which we have to consider. I think that there is no answer to the reasoning which is substantially set forth in the judgments of the Divisional Court, and that their decision was right.

Appeal allowed.

Solicitors for appellant: *Maude & Tunnicliffe, for Simpson & Meakin, Derby.*

Solicitors for respondents: *H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

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Nov. 7, 8 ; *Dec.* 4.

[IN THE COURT OF APPEAL.]

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Claimants *v.* UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON, Respondents.

Damages—Contract—Sale of Goods—Act done by Plaintiff in Mitigation of Damages—Profit accruing therefrom to the Plaintiff—Relevancy—Practice—Appeal—Arbitration—Special Case stated for Consultative Opinion of High Court—Award incorporating Opinion of High Court—Error on Face of Award.

In a special case stated by an arbitrator it appeared that the claimants, the W. Company, having contracted to supply certain electric machines to a railway company, delivered machines which failed to satisfy the conditions of the contract as to economy of working. The railway company accepted the machines, reserving their right to damages for the breach of contract, and subsequently, in order to avoid the expense of the continued use of the machines, bought machines of another manufacturer, P., with which they replaced those of the W. Company. If the railway company had continued to use the W. machines, the loss which they would have suffered in consequence of the breach of contract—namely, the amount by which the cost of working the machines supplied during a period of years representing the normal life of a W. machine would have exceeded the cost of working W. machines constructed in accordance with the contract for the same period—would have represented a larger sum than the price paid for the substituted P. machines :—

Held by Vaughan Williams and Kennedy L.JJ., Buckley L.J. doubting, that, as the substitution of the P. machines went in mitigation of the damages consequent on the breach of contract, the railway company were entitled to recover from the W. Company the price paid for the P. machines; and none the less because the P. machines were so superior to those of the W. Company that it would have been to the pecuniary advantage of the railway company to have effected the substitution at their own cost even if the machines supplied had been in accordance with the contract.

Per Buckley L.J.: According to the meaning of the special case, the arbitrator had not found whether the purchase of the P. machines by the railway company was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their pecuniary advantage ; and if that were the true meaning of the special case, the claimants were entitled to have the award remitted to the arbitrator.

In an arbitration, in which the claimants claimed the balance of the price of their machines and the respondents counterclaimed for damages,

the arbitrator, acting under the Arbitration Act, 1889, stated a special case for the opinion of the King's Bench Division, in which the question submitted was whether the respondents were entitled to recover from the claimants the cost of the purchase and installation of the P. machines. The King's Bench Division answered the question in the affirmative, and the arbitrator subsequently made his award, in which he incorporated the opinion expressed by the Court and adjudicated in favour of the respondents. An application was then made by the claimants to set aside the award on the ground that the opinion of the King's Bench Division was wrong, and being incorporated in the award constituted error on the face of the award; this application was refused:—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that, although the consultative opinion of the King's Bench Division was itself unappealable, the decision of the King's Bench Division refusing to set aside the award which incorporated that opinion was subject to appeal.

APPEAL of the claimants from the decision of a Divisional Court (Pickford and Lush JJ.) refusing to set aside an award made by an arbitrator. The submission to arbitration was dated November 21, 1908, and on June 14, 1910, while the arbitration proceedings were still pending, a special case was stated by the arbitrator for the opinion of the Court. The material parts of the case were as follows:—

1. By a contract under seal dated March 12, 1902, and made between the Metropolitan District Electric Traction Company (whose rights and liabilities at all material times had been vested in the respondents) of the one part and the claimants of the other part, it was agreed inter alia that the claimants should execute and do all things necessary to provide, deliver, and erect within the times therein mentioned, and in accordance with the specification annexed to the contract, eight steam turbines and eight turbo alternators combined of the character, capacity, and efficiency in the contract and specification particularly specified, at the price of 250,000*l.* payable in certain instalments, the last instalment to be paid when all adjustments had been made and the machines respectively should have been operated in commercial service for sixty days to the reasonable satisfaction of the purchasers.

. . . . . .

4. By the contract it was provided that every difference or dispute as to the meaning or effect of the contract and specification

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or in any way arising out of the same or relating thereto should be referred to arbitration, and by an agreement dated November 21, 1908, between the claimants and the respondents, after reciting that disputes and differences within the meaning of the contract had arisen, the parties referred the said disputes and differences to the Hon. Alfred Lyttelton as sole arbitrator, and provided that the arbitration should be in all respects in accordance with the provisions of the Arbitration Act, 1889.

5. In the course of the arbitration before him certain questions of law arose on which he was requested to state a case, and he accordingly stated this case for the opinion of the Court on the following points of law.

6. In pursuance of the contract and specification the claimants at various dates during the years 1904, 1905, and 1906 provided, erected, and delivered to the respondents eight steam turbines and eight turbo alternators, hereinafter referred to as "the said machines." The respondents at various dates paid to the claimants on account of the price of the said machines the sum of 159,431*l.* 3*s.* 2*d.*, and after allowing for certain agreed reductions of the contract price and also for certain sums admitted as due from the claimants to the respondents there still remained a large sum as the unpaid balance of the contract price.

7. The said machines were defective in design and efficiency and did not comply with the provisions of the contract and specification. In particular the said machines failed to satisfy the provisions thereof with respect to economy, and their steam consumption was extravagant and materially exceeded that which the claimants guaranteed by the contract.

8. The respondents nevertheless accepted the said machines and used them for the purpose of their railway and undertaking, reserving always their right to damages in respect of the said breaches on the part of the claimants of the terms of the contract and the losses and expenses thereby occasioned to the respondents.

9. In the year 1907 the claimants, with the respondents' consent, removed one of the said machines from the premises of the respondents and thereafter for a long time by making alterations and improvements therein endeavoured to bring it into

conformity with the terms and conditions of the contract and specification.

10. If their endeavours in this respect had proved successful the claimants intended to effect similar alterations and improvements in the other seven machines. The respondents, always reserving their rights as above mentioned, acquiesced in the claimants making the said experiments on the said machine.

11. After experiments and attempts extending over many months the claimants failed to bring the said machine, even as reconstructed by them, into conformity with the conditions of the contract. This appeared as the result of tests applied to the said machine in July and August, 1908. The respondents thereupon determined to replace the machines delivered by the claimants by others, and they accordingly made arrangements, which at the time of the arbitration had already been partly carried out, to substitute for the claimants' machines machines of different design and manufacture hereinafter called "Parsons machines."

. . . . . .

13. The claim of the claimants before the arbitrator was in substance for the unpaid balance of the price of the said machines. The respondents as against this claim counter-claimed much larger sums as damages for the claimants' breaches of the contract. This counter-claim was originally put in the alternative, first, on the footing of the loss and damage already caused to the respondents and that which would in the future be caused to them by reason of the claimants' breach of contract, assuming that the respondents had continued to make use of the claimants' machines: and alternatively a much smaller sum composed of the damages already caused to the respondents, plus the cost to them of the purchase and installation of the Parsons machines.

14. The respondents at the hearing without formally abandoning the first of the above alternatives did not press it, and relied mainly on the second.

15. The damages flowing from the said breaches by the claimants of the contract appeared to the arbitrator to be ascertainable in the first instance by a sum representing the cost

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of the extra consumption of coal and the extra expense of labour and of the disposal of ashes respectively caused by the defects existing in the said machines delivered by them, from which was to be deducted the extra cost incurred under each of those heads by reason of the defects in the condensing apparatus. So far no serious controversy on the legal aspects of the case arose between the parties.

16. It was contended by the respondents that they were further entitled to recover from the claimants the cost of the purchase and installation of the Parsons machines, and that such purchase had avoided or prevented further and heavy loss and damage which must otherwise have fallen upon the claimants in respect of prospective loss and damage from extra consumption of coal and the extra cost of labour and of disposal of ashes caused by the use of their machines.

The arbitrator found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the claimants if the respondents had continued to use the claimants' defective machines in the future. He further found that the purchase of the Parsons machines was to the pecuniary advantage of the respondents, and that the superiority of the Parsons machines in efficiency and economy over those supplied by the claimants was so great that even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the contract it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the claimants by Parsons machines so soon as the latter were to be obtained.

17. The contention of the claimants in substance was that, having regard to the above facts, the arbitrator was entitled to draw the inference that the "commercial life" of the claimants' machines had expired at the date of the purchase by the respondents of the Parsons machines, and that the said facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable from them by the

respondents after the date when Parsons machines were procurable by the latter: and, further, that the cost of procuring and installing Parsons machines was not recoverable by the respondents from the claimants.

18. The respondents on the other hand contended that the cost of the purchase and installation of the Parsons machines was recoverable by them from the claimants as being the necessary cost and expense incurred by the respondents in mitigating or preventing (as from the respective dates when a Parsons machine was substituted for each of the claimants' machines) the damages which they would otherwise have been entitled to recover from the claimants.

The questions of law for the opinion of the Court were:

1. Whether the contention of the claimants above set forth in paragraph 17 was well founded.

2. If not so, whether the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the claimants as part of the respondents' damages.

The special case was argued before Lord Alverstone C.J., Hamilton and Avory JJ., who held that the contention of the claimants was not well founded and that the contention of the respondents was right. (1) The arbitrator subsequently made his award, in which he recited the opinion of the Divisional Court and adjudicated in favour of the respondents in accordance with that opinion. The claimants then applied to the Divisional Court for an order that the award might be set aside or remitted to the arbitrator upon the ground that there was error in law apparent on the face of the award. The Divisional Court (Pickford and Lush JJ.) dismissed the application. The claimants appealed.

Sir Alfred Cripps, K.C., and *Desmond Fitzgerald* with them), for the claimants. The case finds that the superiority of the Parsons machines was so great that, even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the contract, it would yet have been to the pecuniary

(1) [1911] 1 K. B. 575.

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advantage of the respondents to have replaced at their own cost the machines supplied by the claimants by Parsons machines so soon as the latter were to be obtained. If the acquisition of the Parsons machines put the respondents, when they acquired them, in a better position than that in which they would have been if the claimants' machines had satisfied the terms of the contract, that is a fact which the arbitrator ought at least to take into consideration in deciding whether the proper measure of damages was the whole cost of the purchase and installation of the Parsons machines. Damages should be merely an indemnity to the party injured by a breach of contract; the party injured by the breach is not entitled to make a profit out of it. It would not, of course, have been reasonable for the respondents to go on incurring damage by using the machines supplied by the claimants. They were no doubt bound to do what was reasonable to mitigate the damages. It was argued for the respondents that, the effect of buying the Parsons machines having been to mitigate the damages and the arbitrator having found that it was a reasonable course for the respondents to buy them, it therefore followed that the whole cost of them was the proper measure of damages. The Divisional Court has on those grounds held that, as a matter of law, the arbitrator was bound to give the respondents the whole cost of the Parsons machines. It is submitted that this is not correct. The general principle is that, upon the breach of a contract by one of the parties to the contract, the other party is entitled to be placed as nearly as possible in the same position pecuniarily as he would have been in if the contract had been performed. It is for the arbitrator to determine what that position is, and it does not follow as a matter of law that, if it was a reasonable course for the respondents for the purpose of mitigating the damages to purchase machines superior to those contracted for, the cost of those superior machines is the measure of damages. It may be that it was under the circumstances a reasonable thing for the respondents to purchase the best machines that were on the market at the time in order to mitigate the damages, but it does not follow that they are entitled to recover the whole cost of what was done by them with a view to such mitigation. Part of

that cost ought to be attributed to the failure of the machines supplied by the claimants to satisfy the conditions of the contract, and part to the superiority of the machines subsequently purchased to those contracted for. The respondents have in fact profited by the substitution of the Parsons machines for those contracted for by reason of their superiority. Furthermore, they did not purchase the Parsons machines until they had used the claimants' machines for a period of five years, during which attempts were being made to bring the latter into conformity with the contract; consequently, when the Parsons machines were purchased, they would have a correspondingly greater expectation of life than the machines supplied under the contract. It is in such circumstances a question of fact for the tribunal which has to determine questions of fact, the jury or the arbitrator as the case may be, to determine to what extent the cost of the measures taken for the purpose of mitigating the damages represents the loss occasioned by the breach of contract. The arbitrator has, in effect, been misdirected by being told that, as a matter of law, he is bound to give the whole cost of the Parsons machines by way of damages. [They cited *Lee Conser Natural Gas and Fuel Co.* v. *Carroll* (1); *Wertheim* v. *Chicoutimi Pulp Co.* (2); *Le Blanche* v. *London and North Western Ry. Co.* (3); *Hobbs* v. *London and South Western Ry. Co.* (4); *Hochster* v. *De la Tour* (5); *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (6); *Joyner* v. *Weeks* (7); *Oldershaw* v. *Holt* (8); *Wigsell* v. *Corporation of School for the Indigent Blind* (9); *Dunkirk Colliery Co.* v. *Lever.* (10)]

J. D. Fitzgerald, K.C., and *Roskill, K.C.* (*A. B. Shaw* and *Macassey* with them), for the respondents. The appellants are endeavouring indirectly to appeal against the consultative opinion given by the Divisional Court upon the case stated by the arbitrator, although it is clear that such an appeal will not lie

(1) [1911] A. C. 105, 117.
(2) [1911] A. C. 301.
(3) (1876) 1 C. P. D. 286.
(4) (1875) L. R. 10 Q. B. 111.
(5) (1853) 2 E. & B. 678.
(6) [1903] A. C. 426.
(7) [1891] 2 Q. B. 31.
(8) (1840) 12 Ad. & E. 590.
(9) (1882) 8 Q. B. D. 357.
(10) (1878) 9 Ch. D. 20, 25.

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directly: *In re Knight and Tabernacle Building Society.* (1) Even assuming that consultative opinion to have been wrong, it cannot be reviewed. No doubt the general rule is that an award may be set aside for error in law apparent on its face: see *Hodgkinson* v. *Fernie* (2); *Adams* v. *Great North of Scotland Ry. Co.* (3) The arbitrator who has stated a case for the opinion of the Court is entitled, if not bound, to follow that opinion: *Pearson & Son* v. *Great Western Ry. Co.* (4) The statement of the arbitrator in his award that he has followed the consultative opinion of the Court does not, even assuming that opinion to be wrong, constitute an error in law apparent on the face of the award such as would entitle one of the parties to have the award set aside.

If this Court has jurisdiction to review the decision of the Divisional Court, it is submitted that that decision applies the true measure of damages and is right. The respondents took all reasonable steps to mitigate the damages flowing from the appellants' breach of contract. The arbitrator has found that the purchase of Parsons machines by the respondents was a reasonable and prudent course for them to adopt, and that it mitigated the loss or damage which would have been recoverable from the appellants if the respondents had continued to use their defective machines. [They also cited *Bradburn* v. *Great Western Ry. Co.* (5); *Joyner* v. *Weeks* (6); *Jebsen* v. *East and West India Dock Co.* (7); *Rodocanachi, Sons & Co.* v. *Milburn* (8); *Hinde* v. *Liddell* (9); *Staniforth* v. *Lyall.* (10)]

Sir Alfred Cripps, K.C., in reply. It is indisputable that if on the face of a final award there is an error in law the Courts can interfere: *East and West India Docks Co.* v. *Kirk & Randall.* (11) No doubt if the award had merely contained a statement that the arbitrator had merely followed the decision of the King's Bench Division it would have been unappealable; but the judgment is

(1) [1892] 2 Q. B. 613.
(2) (1857) 3 C. B. (N.S.) 189.
(3) [1891] A. C. 31.
(4) Not reported.
(5) (1874) L. R. 10 Ex. 1.
(6) [1891] 2 Q. B. 31.
(7) (1875) L. R. 10 C. P. 300.
(8) (1886) 18 Q. B. D. 67.
(9) (1875) L. R. 10 Q. B. 265.
(10) (1830) 7 Bing. 169.
(11) (1887) 12 App. Cas. 738.

set out, and there is therefore error apparent on the face of the award.

Cur. adv. vult.

1911. Dec. 4. VAUGHAN WILLIAMS L.J. read the following judgment. This case raises two very interesting questions—first, a question which one might call a preliminary question, that is, whether the advice which the Divisional Court of the King's Bench gives to an arbitrator upon a case stated by him, which he is entitled, if not bound, to follow, and which is admittedly unappealable directly, can be made appealable indirectly by the recital in the arbitrator's award of the advice given by the Court on a case stated pending the arbitration proceedings.

The second question is a question of the measure of damages in a case where a party to a contract injured by the breach of it expends money reasonably and prudently for the purpose of avoiding future damage and mitigating the damage already accruing, and that expenditure results, independently of any further commercial dealing, in advantage to the person so spending his money. The fact that there was no further commercial dealing in this case is important as differentiating this case from some of those cited to us.

Now, with regard to the first question as to an appeal lying, there are some propositions relevant to this case as to which there can be no doubt. Firstly, there can be no doubt but that in the King's Bench Division, when a case is stated by an arbitrator for the opinion of the Court, there is no appeal from the decision of that Court, because the office of the Court under s. 19 of the Arbitration Act, 1889, is consultative only, and what the Court pronounces is an opinion, not a decision equivalent to a judgment or order. Lord Esher M.R., in the case *of In re Arbitration between Knight and the Tabernacle Building Society* (1), says, dealing with the Arbitration Act, 1889, and in particular with the words of s. 19 of that Act, "My judgment is based solely upon the language of the Act itself, but when I consider what the result would be of holding that an appeal would lie I am strengthened in my opinion. It would be an abomination if there could be

(1) [1892] 2 Q. B. 613; 67 L. T. 403.

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an appeal upon the opinion given by the High Court which could be carried to the House of Lords and afterwards at another stage of the arbitration another such appeal—if that were so, the Arbitration Act would be a snare and delusion."

The judgments in the House of Lords in *Pearson & Son, Ld.* v. *Great Western Ry. Co.* (1), which were cited to us by Mr. Fitzgerald in his argument on behalf of the respondents, do not decide the question which is before us, that is, whether the recital in the award of the advice given by the Court on the statement of a case by the arbitrator will, if such advice is wrong in law, render the award of the arbitrator acting on such advice liable to be set aside for mistake in law appearing on the face of the award. The Lord Chancellor speaks of the arbitrator accepting, "as he was bound to accept, the opinion of the Court on the construction of the contract." Lord Halsbury says: "I think, if it were necessary to decide the question, I should be disposed to say that this section" (s. 19 of the Arbitration Act, 1889) "contemplated that the person obtaining such an opinion would be expected to follow it." Then he goes on to say: "It is enough to say, at all events, that an arbitrator is not doing wrong in following the opinion expressed by the Court of King's Bench." Lord Atkinson says: The arbitrator "acted upon the advice which he asked for from the Court and had received on a point of law. Whether this advice was sound or unsound, or whether he was bound to follow it or not, need not be considered. It is clear that he was entitled to follow it (*Adams* v. *Great North of Scotland Railway*. (2)) I think, as I have said, he did nothing more."

These opinions, however, seem to me to afford a reason for following the principles indicated by Lord Esher M.R. in his judgment in the case of *In re an Arbitration between Knight and the Tabernacle Building Society* (3), which I conceive to be, that in construing Acts of Parliament relating to arbitration before an arbitrator appointed as judge of law and fact, prima facie such a construction ought to be given as would result in the finality of the arbitrator's decision. If then it is the duty of the arbitrator to follow the advice given him by the Court upon a case stated, I

(1) Not reported. (2) [1891] A. C. 31, 39, 40.
(3) [1892] 2 Q. B. 613; 67 L. T. 403.

think that neither of the parties to the arbitration ought to be heard to say that the arbitrator was wrong in so doing. I think further that the Courts, recognizing finality as the object of arbitration, ought so to construe the Arbitration Act, 1889, as to render appeal in any shape against the opinion of the Court on a case stated impossible. It is contended, on behalf of the appellants, that so to hold would be inconsistent with the decision of the Court of Common Pleas in the case of *Hodgkinson* v. *Fernie*. (1) There can be no doubt but that since that case it has been recognized as established law that an award may be set aside or remitted to the arbitrator on the ground of a mistake in law appearing on the face of the award; that case, however, was very different from the present. In the present case the mistake, if any, is the mistake not of the arbitrator, but of the Court. The arbitrator is entitled and intended by the Arbitration Act to act upon the answers given by the Court to the questions in the special case. The arbitrator is, I think, bound, but in any case entitled and intended, to act upon them. I say "intended," because it must be intended at least in every case in which the arbitrator is directed by the Court to state a special case after a refusal on his part to do so on the request of a party to the arbitration. Such direction is very generally given on the application of one of the parties to the arbitration against the other party, and the basis of the order of the Court seems to me to be that the Court thinks it right that the question of law in respect of which the Court is asked to direct the statement of the special case should be decided between the parties to the arbitration while the proceedings in the arbitration are still pending. This decision takes the form of an "opinion," but is nevertheless intended to prevent the question of law being left for decision till after the award has been given: this is the reason why the solution of the question by the Court takes a form against which there is no appeal.

The object of this procedure is in my opinion to give the arbitrator, pending the arbitration, assistance in solving questions of law, and at the same time to prevent prolonged litigation respecting such questions after the award has been made. To

(1) 3 C. B. (N.S.) 189.

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observations of Lord Esher in *Knight and the Tabernacle Building Society* (1), which I have already cited, seem to me to recognize this object. It may be useful to contrast the procedure in a case where the opinion of the Court is taken pending the proceedings and before there is any award with the case where an award is made subject to alternative questions of law propounded by the arbitrator on the face of his award, and on which he has not taken the opinion of the Court pending the arbitration proceedings before making his award. In the case where the arbitrator makes his award subject to a question of law propounded in the award, the order of the Court determining such question is an order in the strict sense of the word, and therefore appealable. It would be indeed strange if the right of appeal in the case where the arbitrator states a case for the opinion of the Court pending the hearing should depend, not upon whether the opinion was right or wrong, even though the award is clearly based upon that opinion, but upon the fact that the arbitrator has, or has not, recited the opinion in his award.

As far as I know there has never been a case in which an appeal has been entertained against an award on the ground of error or mistake in law in the opinion given by the Court on a case stated by the arbitrator during the pendency of the arbitration, on the ground that the erroneous decision of the Court is set forth in the award. If an appealwill lie in such a case the general effect will be to prolong and increase the expense of arbitration.

The result is that in my opinion there was no right of appeal in any Court in the present case against the decision of the Divisional Court on the questions of law propounded by the arbitrator in the special case, and I do not think that it makes any difference that the appeal in form is not an appeal against the opinion of the Court expressed in answer to the questions asked by the arbitrator in the special case, but is in form an application to set aside or remit the award on the ground that the arbitrator recites in his award the opinion delivered in answer to the questions in the special case, which application was refused by a Divisional Court consisting of Pickford and Lush JJ., and not

(1) [1892] 2 Q. B. 613; 67 L. T. 403.

by the judges who gave the opinion on the special case. It is the refusal of this application which now comes before us on appeal. Having regard to the observations of the judges who decided *Hodgkinson* v. *Fernie* (1), that case should not be extended, but should be limited to cases clearly falling within the principle of that decision. The old procedure before the Arbitration Act, 1889, for controlling an arbitrator who, it was suggested, shewed signs of going wrong in law pending the arbitration emphasizes the distinction in principle between the question in this case and the question determined in *Hodgkinson* v. *Fernie*. (1)

I will now deal with the second question, namely, whether the opinion of the Court recited in the award was wrong in law. The award, after reciting that the arbitrator has further considered the evidence and arguments and adopted and acted upon the answers given by the Divisional Court to the questions submitted in the special case, proceeds: "I award and determine that the claimants" (that is the Westinghouse Company, Limited) "are not entitled to recover any sum from the respondents in respect of their said claim"—that is to say, 83,293*l*., the unpaid balance of the price of 250,000*l*.—"and that nothing is due from the respondents to the claimants in respect thereof. And I further award and determine that the respondents are entitled to succeed on their counter-claim, and I adjudge that the claimants do pay to the respondents the sum of 15,394*l*. in respect of the said counter-claim of the respondents."

In order to determine the question whether the award is bad in law, one has to consider the questions asked by the special case and also the facts stated by the special case on the basis of which the questions were asked. The arbitrator finds by paragraph 7 that "The said machines were defective in design and efficiency and did not comply with the provisions of the said contract and specification. In particular the said machines failed to satisfy the provisions thereof with respect to economy, and their steam consumption was extravagant and materially exceeded that which the claimants guaranteed by the said contract." Paragraph 8 says: "The respondents nevertheless accepted the said machines and used them for the purpose of

(1) 3 C. B. (N.S.) 189.

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their railway and undertaking, reserving always their right to damages in respect of the said breaches on the part of the claimants of the terms of the said contract and the losses and expenses thereby occasioned to the respondents." The case by paragraphs 9 and 10 recites the attempts of the claimants, with the consent of the respondents, to make the machines conform with the contract warranties, and then by paragraph 11 it says that, after experiments and attempts extending over many months, the claimants failed to bring the said machine, even as reconstructed by them, into conformity with the conditions of the said contract. This appeared as the result of the tests applied to the said machine in July and August, 1908. The respondents thereupon determined to replace the machines delivered by the claimants by others, and the respondents have accordingly made arrangements, which have in part been already carried out, to substitute for the claimants' machines machines of different design and manufacture hereinafter called "Parsons machines." Then by paragraph 13 the arbitrator states: "The claim of the claimants before me was in substance for the unpaid balance of the price of the said machines." The respondents as against this claim counterclaimed much larger sums as damages for the claimants' breaches of the said contract. This counter-claim was put originally in the alternative; first, on the footing of the loss and damage already caused to the respondents and that which would in future be caused to them by reason of the claimants' breach of contract, assuming that the respondents had continued to make use of the claimants' machines; and, alternatively, a much smaller sum, composed of the damages already caused to the respondents plus the cost to them of the purchase and installation of the Parsons machines. Then by paragraph 14 the arbitrator states: "The respondents at the hearing before me, without formally abandoning the first of the above alternatives, did not press it and relied mainly on the second." Then by paragraph 15 it is stated that "The damages flowing from the said breaches by the claimants of the contract would appear to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expense of labour and of the disposal of ashes respectively

caused by the defects existing in the said machines delivered by them," and concludes, "So far no serious controversy on the legal aspects of the case arose between the parties before me."

Now follow the paragraphs which are those on which the question of law before us must really turn when applied to the above recited facts. By paragraph 16 the arbitrator states the contention of the respondents: it is stated thus: "It was contended by the respondents that they were further entitled" (that is beyond the damage stated in paragraph 15) "to recover the cost of the purchase and installation of the 'Parsons machines,' and that such purchase had avoided or prevented further and heavy loss and damage which must otherwise have fallen upon the claimants in respect of prospective loss and damage from extra consumption of coal and the extra cost of labour caused by the use of their machines." Paragraph 16 continues with most important findings in fact by the arbitrator. He says: "I find that the purchase of the 'Parsons machines' by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the claimants if the respondents had continued to use the claimants' defective machines in the future." Stopping at these words, I think the words "reasonable" and "prudent" mean not "reasonable" and "prudent" as a matter of railway management, but a "reasonable" and "prudent" mode of avoiding or preventing further and heavy loss which must otherwise have fallen upon the claimants, and that as between the claimants and the respondents the purchase of the "Parsons machines" would not have been "reasonable and prudent" as a mode of mitigating the damage accruing, if some other and cheaper mode had been available for avoiding and preventing the damage. I construe, therefore, the finding of the arbitrator as meaning that no cheaper mode was available for the mitigation of the damages for which the claimants would be liable in the future. This finding of fact entirely differentiates the present case from the case of *Erie County Natural Gas and Fuel Co., Ltd.* v. *Samuel Carroll*, decided by the Privy Council. (1)

On the findings of the arbitrator in paragraph 16 it seems

(1) [1911] A. C. 105.

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to me that, if the railway company had not elected to purchase the Parsons machines, it would have been a prudent course of the claimants to have purchased the Parsons machines themselves and to have substituted them for their own machines, and in such case they could no more have charged the railway company with the expense than they could have charged the railway company the moneys which they expended in making alterations and improvements while endeavouring to bring their machines into conformity with the contract and specification and those endeavours had been successful. It is true that the arbitrator goes on to find that the purchase of the Parsons machines was to the pecuniary advantage of the respondents and that the superiority of the "Parsons machines" in efficiency and economy over those supplied by the plaintiffs is so great that, even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the said contract, it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the claimants by "Parsons machines" as soon as the latter were to be obtained. In my opinion these further facts in no way obviate what to my mind is the well-established rule of damages in a case where the party damaged by a breach of contract incurs what is reasonable expenditure as between him and the party guilty of the breach to avoid, prevent, or mitigate the damages flowing from a breach of contract. In both the Privy Council cases cited before us there was a resale and a large profit on what was said to have been bought for the purpose of mitigating the damages, which fact goes to negative the purchase having been merely for the purpose of mitigating damages, as it was in this case on my construction of the arbitrator's findings.

Paragraphs 17 and 18 set out the contentions respectively of the claimants and the respondents. Paragraph 17 says: "The contention of the claimants in substance was that, having regard to the above facts, I was entitled to draw the inference that the 'commercial life' of the claimants' machines had expired at the date of the purchase by the respondents of the Parsons machines, and that the said facts were therefore relevant to the question of

the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable from them by the respondents after the date when 'Parsons machines' were procurable by the latter; and further that the cost of procuring and installing 'Parsons machines' was not recoverable by the respondents from the claimants."

I think it is to be noted that when the respondents determined, on the total failure of the claimants' machines, to replace them and made arrangements for the substitution of Parsons machine, they ran a risk, however confident they were of the result, just as they ran a risk when they ordered the Westinghouse machine. Paragraph 18 runs: "The respondents on the other hand contended that the cost of purchase and installation of the Parsons machines was recoverable by them from the claimants as being the necessary cost and expense incurred by the respondents in mitigating or preventing (as from the respective dates when a Parsons machine was substituted for each of the claimants' machines) the damages which they would otherwise have been entitled to recover from the claimants."

The questions of law for the opinion of the Court put by the arbitrator in the special case were:—"(1.) Whether the contention of the claimants above set forth in paragraph 17 of this case is well founded. (2.) If not so, whether the respondents are right in their contention that the cost to them of the purchase and installation of the 'Parsons machine' is recoverable by them from the claimants as part of the respondents' damages." The answer of the Divisional Court to question 1 was: "The contention of the claimants set forth in paragraph No. 17 of the special case is not well founded." To question 2: "The contention of the respondents on the facts as stated is right." I think that these answers are perfectly right on the facts stated by the arbitrator as I construe his findings. The award of the arbitrator admittedly followed the answers of the Divisional Court, and I think that this appeal should be dismissed with costs.

BUCKLEY L.J. read the following judgment:—Before making his award the arbitrator on June 14, 1910, stated a special case for the opinion of the Court on certain points of law arising on the

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arbitrator's findings of certain facts, and the Court answered those questions. To raise the first question in this case, I have to make the hypothesis that the Court answered those questions erroneously. The respondents contend that, even if the answers given were wrong in point of law, the award nevertheless must stand. The consultative opinion of the Court obtained upon the special case was not appealable: *In re Knight and the Tabernacle Building Society.*(1) The decision in that case was rested upon the ground that the action of the Court in that proceeding is not to determine or to decide but only to express an opinion. "There is not to be any determination or decision which amounts to a judgment or order." The arbitrator subsequently made his award annexing a copy of the special case and judgment and stating that they formed part of his award. Upon the face of the award, therefore, as it seems to me, the arbitrator has stated that he has proceeded upon the footing that the law is that which upon the hypothesis I am now making it is not. If this be so, it appears upon the face of the award that it is erroneous in point of law. I understand *Hodgkinson* v. *Fernie*(2) to have decided that, where a reference has been made to a person as sole and final judge of both law and fact, the parties are bound by his decision in all except two cases—first, "where the award is the result of corruption or fraud," and, secondly, "where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award." These are the words of Williams J. in that case. Willes J., again, mentions as an exception to the general rule the case in which there is a mistake of law apparent on the face of the award. "I do not say," he adds, "that my reason assents to that exception. We are bound by the course of the decisions. I regret that we are so." If, therefore, the law was wrongly laid down in the consultative opinion expressed by the Court, as in *In re Knight and Tabernacle Building Society*(1), it seems to me that the arbitrator has adopted (and I agree properly adopted) the law as there expressed, and has upon the face of his award stated that he has proceeded erroneously in point of law. If so the award cannot stand. The argument to the contrary is to this effect.

(1) [1892] 2 Q. B. 613. (2) 3 C. B. (N.S.) 189.

"The opinion of the Court as expressed upon the special case is not open to appeal. To deal with the matter as above is in fact to make it appealable. If this Court now remits the case to the arbitrator, this Court must remit it with directions that the law is other than that which the Court of King's Bench in its consultative opinion expressed it to be." This is true. But it does not follow that it is not right. The decision that the consultative opinion is not appealable was rested upon the reasoning that it was not a determination or decision which amounted to a judgment or order. The reasoning of the respondents, if well founded, leads to the conclusion that it is a determination or decision which cannot be subsequently questioned as between the parties. Upon the first point I think the respondents are wrong; and I must consider the main question in the case.

Upon the main question the relevant considerations are, I think, as follows. I agree that if one entitled to damages for breach of contract does an act reasonably and prudently to reduce the damages, it does not follow that he must give credit for any additional advantage that flows to him from so doing. If a man who has taken a third class ticket from London to the north by one of the great companies is by the negligence of that company damaged by their breach of contract to convey him, and he, to reduce the damages, goes to another of the great companies and takes a ticket by the next train on that line, and is thus enabled to reach his destination by the contract time, but cannot travel by that train unless he takes a first class ticket, his damages may well be the whole of the sum he has to pay for that ticket, although the result is that he has enjoyed a greater luxury of travel. But the question is whether upon the facts found by the arbitrator this case is of that class.

Under the contract the respondents were entitled to machines of 5500 kilowatts with a certain efficiency and having in fact a certain length of life. They purchased Parsons machines of 6000 kilowatts with greater efficiency and with a greater length of life. In the sense that they had had five years of service of the Westinghouse machines and presumably the Parsons machines would last five years longer than those which were displaced. If

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the arbitrator had found that they had no alternative but to purchase such more powerful, more efficient, and more long-lived machines in order to mitigate the damages, the case would have been more easy. But I cannot find that he has found to that effect. The question turns upon the second half of paragraph 16 of the special case. He there finds first certain facts in favour of the respondents, namely, that the purchase was reasonable and prudent and that it mitigated the loss. In the second sentence he finds, so to speak, adversely to the respondents that, even if there had been no breach of contract, it would have been to the pecuniary advantage of the respondents to have bought the Parsons machines when they did at their own cost. Combining and summarizing these two, it seems to me that the finding comes to this: that the purchase of the Parsons machines by the respondents was reasonable and prudent, but that, if there had been no breach of contract, it would have been equally reasonable and prudent for them, nay, more, would have been to their advantage to have bought these machines at the respondents' own cost. This amounts, I think, to saying that the reasonableness and prudence of the course they took was attributable not only to the position in which they found themselves by the breach of contract, but also, and even in a greater degree, to considerations of their own pecuniary advantage. If this be the right construction of this paragraph of the special case, it seems to me that the answer of the Divisional Court to the second question was erroneous, and that an error of law thus appears on the face of the award and entitles the appellants to an order. To put the matter in a concrete form, it seems to me that, if I read the special case correctly, the appellants are entitled to have the decision of the arbitrator as to whether the purchase of these machines of greater power, greater efficiency, and longer life was reasonable and prudent for the purpose of mitigating the damages apart from its prudence for their own pecuniary advantage, and, if so, whether it was the only reasonable and prudent course which they could take to mitigate the damages, or whether, for instance, they could have bought Parsons machines of 5500 kilowatts and of efficiency and length of life no greater than that of the discarded machines.

Upon this point they have had no decision from the arbitrator, and if I am right in the construction of paragraph 16 of the special case, I think they are entitled to it. The other members of the Court do not, however, as I understand, read the special case as I do, and under those circumstances I do not, if I were to adopt their opinion as to its meaning, differ from their conclusions.

KENNEDY L.J. read the following judgment:—In this case, in which the appellants ask this Court to set aside an award or remit it to the arbitrator, two points, which I will call respectively the main point and the preliminary point, arise for our consideration. The main point is, Has the arbitrator, as the appellants contend that he has, made an award upon the face of which it appears that he has made a mistake of law? There cannot, in my opinion, be any doubt that an award upon the face of which such a mistake is apparent cannot stand: *Hodgkinson* v. *Fernie*. (1) The preliminary point which, if decided in favour of the respondents, would render the consideration of the main point unnecessary, is whether, as in this case, the allegation of a mistake in point of law upon the face of the award is founded upon the arbitrator having followed the direction given to him by the Divisional Court (Lord Alverstone C.J., Hamilton and Avory JJ.) upon a case stated by him, and therefore not in itself appealable, it is open to this Court to treat the award as bad, for mistakes of law, in following the direction of the Divisional Court. In other words, is it open to this Court to review, when adopted by the arbitrator in his award, the direction of the Divisional Court, which, when given, could not be the subject of appeal?

It appears to me that this is, undoubtedly, a difficult and, so far as I know, a novel question. But, upon the whole, I have come to the conclusion that, if we were of opinion that the answers which the Divisional Court gave to the questions submitted to that Court by the arbitrator were wrong in law, and if (as is the fact) it appears upon the face of the award that the award is founded upon the arbitrator's adoption of those answers, we are not precluded by the fact that the opinion given by the Divisional

(1) 3 C. B. (N.S.) 189.

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Court was not subject to appeal (as was decided in the case of *In re Knight and the Tabernacle Permanent Building Society* (1)) from saying that the mistake in law is a good ground for setting aside the award or remitting it to the arbitrator. He was quite right—he did his duty—in following the opinion of the Divisional Court. There was no misconduct involved in his so doing. But none the less, if the opinion is in our judgment erroneous, and, being acted upon by the arbitrator, has produced an error of law upon the face of the award, we are entitled and bound, upon that ground, to set aside or remit the award.

It is not, as it appears to me, either unreasonable or inconsistent with authority to hold that, whilst an appeal cannot be brought upon an opinion of the Divisional Court given to the arbitrator who has consulted that Court upon a point of law arising in the course of the arbitration proceedings, which may or may not, as the arbitration proceeds, affect the award, an appeal does lie to set right an award which upon its face depends upon an erroneous view of the law, from whatever source that error has arisen.

Upon the main question raised in this appeal, as to the correctness or incorrectness of the award in point of law, I am of opinion that there is no ground for this appeal. I see really little to add to the reasoning of the Lord Chief Justice and Hamilton J. in the Divisional Court when this case was before them on the case stated by the arbitrator; but I will shortly put the matter in my own way, in accordance with the findings of fact, as I understand them, which appear in the award.

The vendors confessedly broke the contract with the purchasers by supplying to them, for the purpose of working the underground electric railways, certain machines which were defective in design and efficiency and did not comply with the provisions of the contract and specification. The respondents gave the appellants the opportunity of trying to remedy the faults and defects, but the efforts of the appellants failed. It appears to me that, directly this breach was ascertained, the respondents in point of law became entitled to compensation in damages for the loss naturally and directly flowing from

(1) [1892] 2 Q. B. 613.

that breach, i.e., the difference between the machines as contracted for and the machines as supplied by the appellants. This loss would properly be measured in the arbitration by the damages already sustained by the respondents, by reason of that difference during the time they have worked the machines or tried to work them, and the further damages which they would for the same reason sustain during a period to be measured by the working life, whatever that may be, of a Westinghouse machine if constructed according to the terms of the contract and specification. As I understand the case, the soundness of this general proposition was not seriously controverted by the appellants. But, whilst the respondents, in the absence of other circumstances, would be entitled to recover damages on this basis, our law justly requires the party who is injured by a breach of contract to avail himself of any opportunity to mitigate those damages of which a reasonable man of business would avail himself if he were so injured and there was nobody from whom he could recover damages. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (1), the person who has broken the contract is not to be exposed to additional cost by reason of the injured party not doing what he ought to have done as a reasonable man. In the present case, after doing for some years the best they could with the defective machines, the respondents had the opportunity of mitigating the loss for the future by the purchase and installation of Parsons machines, and they availed themselves of it. It is expressly found by the arbitrator (paragraph 16 of the case) that the course so taken was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants, if the respondents had continued to use the appellants' machines in the future. There is no suggestion in the case, nor was it even hypothetically suggested in the argument before us, that there was either any other make of machine, or a cheaper Parsons machine, which the respondents could have purchased, and which would have been as efficient as the appellants' machines would have been if they had been as good as the stipulations of the contract between the appellants and respondents required

(1) 9 Ch. D. at p. 25.

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them to be. In other words, upon the evidence the respondents have by the purchase of the Parsons machines availed themselves of the only course which as reasonable men of business they could take to mitigate the damages recoverable from the appellants. The arbitrator's award gives the appellants the full benefit of that mitigation. Instead of charging the appellants with the far larger sum in damages which must have been charged to them if the reasonable course of purchasing and installing the Parsons machines had not been adopted by the respondents, he has charged them with the cost of that purchase and installation. This was the course which, as appears upon the face of the award, the Divisional Court had told him was the right course, and he has acted on the Court's opinion. The appellants contend that in so doing he has erred in point of law. Why? They rely, as they unsuccessfully relied, upon the argument of the special case in the Divisional Court, upon the finding of the arbitrator in the 16th paragraph, from which I have already quoted, that the purchase of the Parsons machines was to the pecuniary advantage of the respondents; that the superiority of those machines in efficiency and economy over those supplied by the appellants is so great that, even if the appellants had delivered to the respondents machines in all respects complying with the conditions of their contract, it would yet have been to the pecuniary advantage of the respondents, at their own cost, to have replaced the machines supplied by the appellants by Parsons machines so soon as the latter were to be obtained. It appears to me that this finding of the arbitrator does not in the least justify the appellants' contention, which indeed in my view involves a confusion of the principles of law which govern the duty of the party who has been injured by a breach of contract and the legal principles which regulate the measure of damages. I conclude this part of my judgment by quoting a passage from the judgment of Hamilton J., with whom I entirely concur; I am quoting from the shorthand note of his judgment, which is somewhat fuller than the report: "There are, of course, cases in which you may have your choice of several substitutes, and one is better than another, but it does not follow that the best is therefore properly substituted against the vendor who is in

breach of his contract: the second best may be nearer to the contracted article, and may be the proper thing to be substituted. This is, again, a question which is solved as soon as the arbitrator has decided that the substituted article is the right thing. The question of whether the Parsons machine does not turn out to be a very superior apparatus, which will bring to the Underground Electric Railways Company of London considerable accession of revenue, has been considered in so far as it is material to be considered at all, and has been concluded by the finding that the purchase of the Parsons machine was a reasonable and prudent course in mitigation of damages. If there be any concomitant and ancillary advantages which accrued to the buyers by the course which they have so taken, no authority has been produced for saying that the vendor who is in breach is entitled to have an account taken of that. It is a transaction subsequent to the breach, a transaction inter alios, and one which appears to me relevant to the question of breach only so far as is necessary to ascertain what is the reasonable course to pursue in mitigation of damages." The learned judge in those few sentences appears to me to cover the whole ground.

A few words in conclusion as to the cases referred to in the arguments of counsel. *Joyner* v. *Weeks* (1) is to some extent in favour of the respondents. The two recent Privy Council cases, upon which Sir Alfred Cripps appeared to place some reliance, do not, I think, when examined, help us to a solution of this case. In *Erie County Natural Gas and Fuel Co.* v. *Carroll* (2) the plaintiffs' claim was for damages for the defendant's breach of contract in not supplying a quantity of natural gas. To provide themselves with such gas, the plaintiffs erected works at a cost which was less than the price for which they sold those works when erected. The Privy Council held that no damage had been proved. It seems to me that the decision is in accord with the rule as to damages in the case of the non-delivery of an article which the vendor has failed to deliver according to his contract. The damages ordinarily, and in the absence of special circumstances, consist in the cost to the vendor of procuring the article elsewhere; if the cost is less, no damage can be recovered. The

(1) [1891] 2 Q. B. 31. (2) [1911] A. C. 105.

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second case in the Privy Council, *Wertheim* v. *Chicoutimi Pulp Co.* (1), was a case of the non-delivery of Canadian wood pulp on the contract date. The market price at the date at which the wood pulp was actually delivered was lower than on the contract date, and the plaintiff claimed the difference in price as damages for the breach of contract. If these facts had stood alone the plaintiff would, as it appears to me, have been held entitled to recover such damages. But in fact the plaintiff had, by a contract of resale, succeeded in disposing of this late delivered wood pulp at a price greatly above the market price at the date of the actual delivery, and upon this particular state of facts the Privy Council, as I understand the purport of their judgment, held that the ordinary rule as to the measure of damages in the case of late delivery did not apply, and that the only damages recoverable by the vendor consisted in the difference between the price at the due date of delivery and the price obtained by the vendor on the resale. For the reasons I have stated I have not been persuaded by the learned counsel for the appellants that either of these cases has any applicability to the case which we have to decide. I think the award is not erroneous in point of law, and in my opinion this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Faithfull & Owen.*
Solicitors for respondents: *Bircham & Co.*

(1) [1911] A. C. 301.

W. J. B.

[IN THE COURT OF APPEAL]

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Oct. 13

SLATFORD *v.* ERLEBACH.

Practice—Costs—Trial before Official Referee—Separate Issues—Issue on which Plaintiff succeeds held Statute-barred—No Order affecting Costs of Issue—Plaintiff held entitled to Costs of Issue—Order LXV., *r.* 1.

The plaintiff, a builder, sued the defendant to recover the balance of the contract price of a house, and the defendant pleaded, first, that the work had been unsatisfactorily carried out and that there was no balance due, and, secondly, that the action was barred by the Statute of Limitations. At the trial of the action the official referee found that the plaintiff was on a named date entitled to maintain the action for a named amount, but that the Statute of Limitations was a bar to his right to maintain the action. He accordingly directed judgment to be entered for the defendant, and that the defendant should recover from the plaintiff the costs of the action, except so far as they might have been increased by any defence other than that of the Statute of Limitations. Upon taxation the taxing Master held that the plaintiff was entitled to the costs of the issue upon which he had succeeded:—

Held, that the plaintiff, having succeeded in establishing that a debt was due to him, had succeeded in an "event" within the meaning of Order LXV., r. 1, and was therefore entitled to the costs of that issue.

APPEAL from an order of Horridge J. at chambers.

The action had been sent for trial to an official referee, who on June 13, 1910, made his report, by which he found as follows:—

1. The plaintiff's claim was, firstly, as vendor against the defendant as purchaser of a house and premises built for the defendant by the plaintiff under a contract in writing, dated May 23, 1901, for the balance of the price due under the said contract, and, secondly, against the defendant for the balance of the price of additional work and materials done for and supplied for the defendant by the plaintiff subsequently to the said date.

2. On and after June 25, 1902, the plaintiff was entitled to maintain and claim against the defendant under the said contract and for the price of additional work and materials done and supplied for the defendant after making such allowance and deductions as I find to be fair and reasonable in respect of contract work not executed and inferiority of materials and

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workmanship supplied and done for the sum of 247*l.* 7*s.*, made up as follows:—

Price under contract and for additional work as charged in plaintiff's account to the said date					£3445	0	0
Deductions—							
1. For boundary wall not rebuilt	£50	0	0				
2. For wall paper not supplied	41	7	0				
3. Allowance for inferiority of some of the materials and work	50	0	0				
	141	7	0		141	7	0
					3303	13	0
Sums paid on account or for which defendant was entitled to credit					3056	6	0
					£247	7	0

3. Subsequently, namely, in the month of May, 1903, the plaintiff did further work and supplied further materials for the defendant at his request in respect of the price of which the sum of 15*l.* became due and payable to the plaintiff by the defendant. After the commencement of the action the defendant paid into Court the sum of 15*l.* in satisfaction of the plaintiff's claim for the said sum for the said work and materials.

4. The plaintiff's cause of action for the said sum of 247*l.* 7*s.* first accrued to the plaintiff more than six years before the commencement of this action.

5. No acknowledgment in writing of the defendant's liability was made by the defendant or by any agent of the defendant duly authorized thereto or was contained in any writing signed by the defendant or any such agent within six years before the commencement of this action, nor was any payment on account of the said liability or any part thereof made by the defendant to the plaintiff within six years before the commencement of the action.

I decide that the Statute of Limitations is a bar to the right of the plaintiff to maintain this action for the recovery of the said sum of 247*l.* 7*s.*

I direct that judgment be entered in the action for the defendant.

I direct that the costs of the defendant of the action except so far as the same may have been increased by the defences other than that of the Statute of Limitations be taxed, and that judgment be entered for the defendant that he do recover from the plaintiff the amount at which the said costs are allowed on taxation.

As to the defendant's costs of the counter-claim apart from the defence (if any) I give no direction and make no order.

On June 28, 1910, judgment was entered for the defendant, which proceeded thus: "and that he recover from the plaintiff his costs of the action except so far as the same may have been increased by the defences other than that of the Statute of Limitations and that the defendant do recover from the plaintiff the amount of such costs to be taxed."

The plaintiff claimed to be entitled to the costs of all the issues on which he had succeeded, namely, of all issues other than that of the Statute of Limitations, although he had in fact not succeeded in recovering anything in the action; and the taxing Master decided in his favour that he was entitled to the costs of all the issues on which he had succeeded.

The defendant objected to the taxation on the two following general grounds which applied to the allowance of the whole of the plaintiff's bill: (1.) "That on the true construction of the order of the official referee and the judgment signed thereon the plaintiff is not entitled to any costs, not having succeeded on any issue and having recovered nothing in the action, the same being dismissed with costs to be paid to the defendant and none to the plaintiff." (2.) "If the plaintiff is entitled to any costs at all in respect of the issues of fact other than the issue as to the Statute of Limitations, then the defendant contends that such costs must only be those by which the plaintiff's costs of the action have been increased by reason of the defences other than the Statute of Limitations. The question of amount having been directed by the official referee to be tried before he decided the question of law on the Statute of Limitations and much of the evidence being relevant to 141*l.* 7*s.* on which the defendant succeeded and to the question of the agency of Mr. Glover and Mr. Flint, the defendant and not the plaintiff is entitled to these costs."

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In answer to the defendant's objections to taxation the taxing Master said that he decided that the plaintiff was entitled to the costs of the issues upon the following authorities: Order LXV., r. 2; *Hubback* v. *British North Borneo Co.* (1); *Stooke* v. *Taylor* (2); *Hoyes* v. *Tate* (3); *Atlas Metal Co.* v. *Miller* (4); *Powell* v. *Vickers, Sons & Maxim, Ld.* (5) He further said that he had not allowed to the plaintiff any general costs of the action, but only the increased costs of the issues upon which he was held on a certain date to be entitled to recover 247*l.* 7*s.* and the 15*l.* which the defendant paid into Court.

The defendant applied to the judge in chambers for an order to the taxing Master to review his taxation, and on June 19, 1911, Horridge J. made an order referring back the taxation to the taxing Master. The plaintiff appealed.

Compston, for the plaintiff. The plaintiff, having succeeded on an issue as to the balance of the account, is entitled to the costs of that issue, though the defendant is entitled to the general costs of the action. Where a party is successful as to one of several issues, and the judge makes no order with regard to that issue interfering with the incidence of costs under Order LXV., r. 1, the party is entitled to have the judgment drawn up so as to give him the costs of the issue on which he succeeds: *Hoyes* v. *Tate*. (3) [He also cited *Wagstaffe* v. *Bentley* (6); *Hubback* v. *British North Borneo Co.* (7); *Hawke* v. *Brear*. (8)]

Ernest Todd, for the defendant. In fact no issue was found by the official referee in the plaintiff's favour. He found that, but for a legal defence, which was proved, the plaintiff would have been entitled in certain events to get 247*l.* from the defendant. The judgment does not give the plaintiff anything. The judgment of the official referee is clear; by giving costs to the defendant it has deprived the plaintiff of costs. There has been no "event" in favour of the plaintiff within the meaning of Order LXV., r. 1.

Compston was not called upon to reply.

(1) (1904) 53 W. R. 70.
(2) (1880) 5 Q. B. D. 569, 591.
(3) [1907] 1 K. B. 656.
(4) [1898] 2 Q. B. 500.
(5) [1907] 1 K. B. 71.
(6) [1902] 1 K. B. 124.
(7) [1904] 2 K. B. 473.
(8) (1885) 14 Q. B. D. 841.

VAUGHAN WILLIAMS L.J. I am of opinion that the appellant is entitled to succeed. The question raised at chambers before Horridge J. was whether the taxing Master was right in the view which he took and which he expresses thus in his answers to the defendant's objections to his taxation: "I have not allowed to the plaintiff any general costs of the action, but only the increased costs of the issues upon which he was held on a certain date to be entitled to recover 247*l.* 7*s.* and the 15*l.* which the defendant paid into Court." It is contended on behalf of the defendant that this is a case in which there has not been an "event" in favour of the plaintiff within the meaning of Order LXV., r. 1. At the trial before the official referee two distinct issues were raised on the pleadings: first, as to there ever having been any indebtedness by the defendant to the plaintiff in respect of these building operations, and, secondly, whether the right of the plaintiff to maintain this action was statute-barred. The official referee found that work had been done and materials supplied by the plaintiff for the defendant which, after allowing for all payments on account, left a sum of 247*l.* 7*s.* due to the plaintiff by the defendant at a date in 1902. We are told that the trial lasted a long time, which I can well imagine, for the question turned mainly on the quality of the work done and materials supplied by the plaintiff. In the result, the official referee did not find, as the defendant hoped he would do, that the work had been so ill-performed that there was at the end of it no sum remaining due from the defendant to the plaintiff: he held the work was so done that the sum of 247*l.* 7*s.* accrued due as a debt from the defendant. On the second question, that raised by the plea of the Statute of Limitations, the official referee found that the cause of action had accrued to the plaintiff more than six years before the commencement of this action, and that there had been no written acknowledgment or payment on account by or on behalf of the defendant within the six years. In the result, the plaintiff failed to recover anything, and judgment was entered for the defendant; but, nevertheless, upon the issue as to the existence and the quantum of the debt the plaintiff was successful. Is the plaintiff entitled to his costs of the issue upon which he succeeded? The material part of Order LXV., r. 1, upon which the question

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depends, is as follows: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge: Provided . . . . that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." We have first to consider whether in the present case there is an "event" in favour of the plaintiff within the meaning of that rule. To me it is plain that there was an "event" upon that issue, and that it was in the plaintiff's favour. The defendant, however, contends that, even if that be so, it was not an effective event, because the plaintiff recovered nothing that he could enforce. But I do not agree that that is the meaning of the rule; in my opinion, where an issue has been tried and decided, there is an "event" upon which the successful party is entitled to his costs as following that "event."

Then there was a further point taken upon the proviso at the end of the rule, and it was said that the official referee did "otherwise order" within the meaning of that proviso. It is contended that, as there are no express words in the official referee's certificate giving the plaintiff the costs of the issue on which he succeeded, the certificate ought to be read as depriving him of the costs of the issue for good cause shewn. But I can see nothing in the judgment or certificate which can be read as depriving the plaintiff of the costs of the issue. I think, therefore, that the view taken by the taxing Master was right, and that this appeal from the reversal of his decision by Horridge J. must be allowed.

BUCKLEY L.J. The plaintiff, a builder, brought an action against the defendant, a customer, to recover a sum of 427*l.* 9*s.* 3*d.*, the alleged balance of a debt due for building work carried out for the defendant. The answer of the defendant to the claim was, in substance, "I owe nothing." The question whether or no there was a debt due from the defendant to the plaintiff was tried before the official referee, and the result was a finding that in June, 1902, there was a debt due of

247*l.* 7*s.* The plaintiff therefore succeeded in establishing the existence of a debt, though of a less amount than the plaintiff's claim. In my opinion that was an issue, the determination of which was an "event" within the meaning of Order LXV., r. 1. But the defendant took the further point that, even if there were such a debt, the plaintiff could not recover if because he was bound by the Statute of Limitations, and on this point the defendant succeeded. The investigation into the existence or not of the debt became therefore immaterial. The official referee thereupon gave his certificate, which is equivalent to a judgment, and thereby adjudicated in defendant's favour as to the general costs of the action. We must see whether that certificate contains anything which can be construed as depriving the plaintiff of the benefit of the proviso at the end of Order LXV., r. 1. In order to see whether the official referee has "for good cause shewn otherwise ordered" it is only necessary to read the certificate; it is quite plain that he has done nothing of the kind. It is suggested for the defendant that the case raised a whole series of issues, and that in the end the defendant was successful, and gets all the costs. I do not agree with that view: I think that the one issue seriously raised and fought was as to the existence of a debt: it follows that the plaintiff, who succeeded upon that issue, is entitled to his costs in respect of it. It was further suggested that the plaintiff could not get any costs in respect of an action to recover a statute-barred debt, but we cannot consider that question: the official referee might, if he took that view, have refused under Order LXV., r. 1, any costs to the plaintiff: but he has not done so. The result is that the plaintiff, having succeeded upon an issue, is entitled to the costs of that issue. The appeal must be allowed, with the result that the order of Horridge J. must be discharged, and the taxing Master's decision affirmed.

Appeal allowed.

Solicitor for plaintiff: *Edgar Bogue.*
Solicitor for defendant: *W. G. Glover.*

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[IN THE COURT OF APPEAL.]

AFFLECK *v.* HAMMOND AND ANOTHER.

Practice—Security for Costs—Nominal Plaintiff—Action by Bankrupt—Cause of Action arising after Bankruptcy—"Personal Earnings"—Intervention of Trustee.

The plaintiff, while an undischarged bankrupt, earned his living as a commission agent, and obtained from the defendants a commission note under which he was to be paid 60*l.* if he procured a certain loan for them. The whole or part of the 60*l.* would be required for the bankrupt's maintenance. The trustee in the plaintiff's bankruptcy gave notice to the defendants that he claimed any money payable to the plaintiff under the commission note, but subsequently gave them notice of withdrawal of his claim. The defendants applied for an order that the plaintiff should give security for the costs of the action on the ground that he was merely a nominal plaintiff suing for the benefit of the trustee:—

Held, that the money claimed by the bankrupt was his "personal earnings," and was therefore excepted from the property passing to his trustee in bankruptcy, and that, as the whole or part of it was required for his maintenance, he was not a mere nominal plaintiff and could not be ordered to give security for costs.

APPEAL of the defendants from an order of Scrutton J. sitting at chambers.

The claim of the plaintiff in the action was for "the sum of 60*l.* commission payable by the defendants in accordance with the terms of a commission note given by the defendants to the plaintiff and dated August 24, 1911."

The plaintiff had been adjudicated a bankrupt in the year 1903, and had not obtained his discharge. He earned money as a commission agent, and on August 24, 1911, the defendants gave him a commission note which was in the following terms: "In consideration of your obtaining for us a loan of 1000*l.* (one thousand pounds) for the purpose of reconstructing the management and conduct of the Cocoa Tree Club and of our accepting the same we hereby agree to pay you a commission of sixty pounds as and when we receive the said loan and a further twenty pounds in the first week of January, 1912, and we agree to confirm the arrangement made on your behalf in 1903 by

Mr. T. F. Kynnersley in respect of your free membership of this club."

On November 1, 1911, the plaintiff, who alleged that he had earned the 60*l.* commission, issued the writ in the present action.

On November 11, 1911, the trustee in bankruptcy of the plaintiff wrote to the defendants a letter in which he claimed to be entitled to any moneys which might become payable to the plaintiff. The defendants thereupon took out a summons before a Master asking for an order that the plaintiff should give security for the costs of the action, upon the ground that he was merely a nominal plaintiff and was suing for the benefit of his trustee in bankruptcy. The Master made an order that the plaintiff should give security for costs; but, on appeal to Scrutton J. at chambers, this order was reversed. The defendants now appealed by leave.

The plaintiff made an affidavit in opposition to the defendants' application, in which he swore that he earned his living as a commission agent, that the money due to him on the commission note was personal earnings, and that all or part of the amount was necessary for his maintenance, and that his earnings since the previous December had not exceeded 100*l.*

On November 28, 1911, the trustee in bankruptcy wrote to the defendants informing them that, after fully considering the matter, he did not propose to intervene at all, and asking them to take the notice as a withdrawal of his previous notice to them of November 11.

Giveen, for the defendants. The Master's order was right, for the plaintiff is merely a nominal plaintiff suing for the benefit of his trustee in bankruptcy. Under the Bankruptcy Act, 1883, all the bankrupt's property vests in the trustee in bankruptcy, who has intervened; this money therefore belongs to the trustee, and the plaintiff is merely suing for his benefit. The trustee cannot withdraw his claim to this money, when he has once made it: *Ex parte Carter, In re Carter*. (1) Further, the money which the bankrupt claims as his own is not "personal earnings" within the meaning of the decided cases.

[VAUGHAN WILLIAMS L.J. referred to *Bailey* v. *Thurston*. (2)]

(1) (1876) 2 Ch. D. 806. (2) [1903] 1 K. B. 137.

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In that case there had been no intervention by the trustee in bankruptcy. It is clear that when money is earned by, or a right to damages accrues to, a bankrupt, the property vests in the trustee.

[KENNEDY L.J. In *Williams* v. *Chambers* (1) a bankrupt's assignee sued the defendant for work and labour performed and bestowed by the bankrupt as agent of and for the defendant at his request; there was a plea that payment had been made to the bankrupt and that the amount was not more than was necessary for his support and that of his family; the replication was to the effect that the defendant did not pay the bankrupt before the assignee intervened; and a demurrer to that replication was held good. I cannot imagine a nearer case than that.]

In that case it was assumed that personal services had been rendered by the bankrupt to the defendant; but in the present case it is contended that it is not within the class of cases relating to personal work or service. Under the contract in the present case the bankrupt would only become entitled to payment of a single sum of money in respect of a single transaction, and it is contended that that is not "personal earnings" within the meaning of the decided cases. In *Mercer* v. *Vans Colina* (2) Wright J. said that "personal earnings" seemed to be "something analogous, both in its character and in the nature of its remuneration, to personal daily labour—not, of course, manual or menial only." In *Shoolbred* v. *Roberts* (3) Phillimore J. in adopting the view of Wright J. said: "There must at least be an element of periodicity in the earnings. Lump sums arising at very indefinite periods—windfalls, so to speak—are not, at any rate in my opinion, protected under s. 44." Here there is no element of periodicity at all. Sect. 53, sub-s. 2, of the Bankruptcy Act, 1883, which provides that the Court may order payment of the whole or part of the "salary or income" of a bankrupt to be made to his trustee, includes everything in the nature of "personal earnings" not passing to the trustee. The expression "salary or income" cannot be

(1) (1847) 10 Q. B. 337. (2) [1900] 1 Q. B. 130, n.
(3) [1899] 2 Q. B. 560.

held to include the sum of money in the present case: *Ex parte Benwell, In re Hutton* (1); *In re Shine, Ex parte Shine.* (2)

[VAUGHAN WILLIAMS L.J. referred to *Prudent* v. *Badger.* (3)]

R. M. Barton, for the plaintiff. To constitute intervention by the trustee, the Court must at least be satisfied that the trustee intervening was fully cognizant of all the facts and must at least have manifested a genuine intention to take part in the action, if not by getting himself substituted as plaintiff, at least by getting himself added as a co-plaintiff under Order XVI., r. 11: *Emden* v. *Carte* (4); *Cohen* v. *Mitchell.* (5) In the present case, when the trustee had seen the bankrupt and had ascertained the facts as to his financial position, he actually withdrew his intervention. Again, there were here personal earnings, a part of which, at any rate, was necessary for the bankrupt's maintenance. A commission agent has no office or clerks, and what he earns he earns by his own personal exertions. The bankrupt was clearly entitled to keep sufficient of his personal earnings for his maintenance: *In re Roberts* (6); *Williams* v. *Chambers.* (7)

[He was stopped by the Court.]

Giveen in reply.

VAUGHAN WILLIAMS L.J. The question in this case, which has been well and exhaustively argued, arises under s. 44 of the Bankruptcy Act. [His Lordship read the section.] It is obvious that the words used in that section would in their strict signification include even the personal earnings of a debtor; but judicial decisions have long since engrafted upon the provisions of the section as grammatically construed an exception in favour of the "personal earnings" of a bankrupt, whatever that expression may mean. It is unnecessary to occupy any time in discussing its meaning, as we are all of opinion that the money payable under the commission note in this case is personal earnings. [His Lordship read the commission note.] I think that this sum is not merely "personal earnings," but that we ought also to hold that it is personal earnings of such an amount that the whole

(1) (1884) 14 Q. B. D. 301.
(2) [1892] 1 Q. B. 522.
(3) (1856) 1 C. B. (N.S.) 296.
(4) (1881) 17 Ch. D. 169.
(5) (1890) 25 Q. B. D. 262, per Fry L.J. at p. 270.
(6) [1900] 1 Q. B. 122, 128.
(7) 10 Q. B. 337.

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ought to be appropriated to the maintenance of the bankrupt. I wish to say no more as to the argument that this money is not personal earnings beyond this: upon the case of *Bailey* v. *Thurston* (1) I am clear that the money payable under the commission note is not money payable under a speculative contract; it was a contract under which it was contemplated that the plaintiff would expend work and labour for the purpose of obtaining a loan for the club and so earn his remuneration. Under the circumstances I am clearly of opinion that we ought to treat this contract as being one for work and labour, and none the less because the contract is in form a commission note.

Now, this action having been brought on this commission note, the trustee in bankruptcy of the plaintiff at one time intervened and asserted his right to recover this money as being a right which had passed to him as trustee. I assume for the moment that the right to recover this money was a right of action which would pass to the trustee in bankruptcy if he intervened; it is said that he did intervene, and a letter is produced as evidence of his intervention. The action was, however, brought in the plaintiff's name alone, and if the whole benefit of the action passed to the trustee in bankruptcy an order for security for costs might properly be made upon the plaintiff, for he would in that case be merely a nominal plaintiff suing for the benefit of somebody else. But, as a matter of fact, the trustee at a later period seems to have withdrawn his intervention, and it is since that date that the order appealed against was made. It is said on behalf of the defendants that, when once a trustee in bankruptcy has intervened, his intervention cannot be withdrawn: it is unnecessary to deal with that point. But I do say that, assuming that the trustee could not withdraw his claim when he had once intervened, that claim could not be for the whole of the moneys sued for, for the bankrupt is entitled to retain a sufficient portion of it for his livelihood and maintenance. Under the circumstances, I think that Scrutton J. exercised a proper discretion in refusing to make an order for security for costs, having regard to the fact that the whole sum sued for is appropriated to the plaintiff as personal earnings required for his livelihood and

(1) [1903] 1 K. B. 137.

maintenance. That is really quite sufficient to dispose of this appeal.

But as a good deal has been said in the course of the argument as to what property vests in the trustee in bankruptcy and what does not vest in him under a contract which results, when performed, in personal earnings, I will add a few words on the point. The subject is dealt with in *Bailey* v. *Thurston* (1), which has already been quoted. In his judgment Stirling L.J. says (2): "In the case of a contract in fieri and unexecuted, which cannot be completed without the assistance of the bankrupt, the trustee would be unable to complete it without the co-operation of the bankrupt, nor could the trustee compel such co-operation. Such a contract is incapable of assignment, and in my opinion it is impossible to hold that it would vest in the trustee on the bankruptcy occurring." And in the same case Cozens-Hardy L.J. says: "It has been established for many years that, notwithstanding the generality of the language used in the Bankruptcy Acts, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee and not the bankrupt will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation." I do not know that it is necessary for me to decide whether a trustee in bankruptcy who has intervened could recover by the machinery of an action such moneys accruing due after the bankruptcy. It may be that the right of the trustee is only a right in the Bankruptcy Court to have so much of the money recovered as is not required for the bankrupt's livelihood and maintenance appropriated to him by order of the Bankruptcy Court; in other words that the trustee will by such an order get the excess remaining after the deduction of sufficient for the maintenance of the bankrupt. It may be, however, that the

(1) [1903] 1 K. B. 137. (2) [1903] 1 K. B. 145.

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intervention of the trustee would give him a right to bring an action in his own name to recover the money. As I feel some doubt upon that question, I do not decide it; it is sufficient to decide that this money is money in respect of which the bankrupt is entitled to sue, and we have not to decide anything as to the effect of an intervention by the trustee later on. Upon the facts it seems that the whole of the amount sued for is or may be required for the bankrupt's maintenance, and under such circumstances I am clearly of opinion that an order for security for costs ought not to be made; the plaintiff is not really a nominal plaintiff in respect of a single penny of his claim, and the order of Scrutton J. was right.

Personally it would be of great interest to me, if I felt it consistent with my duty, to trace the history of this question, and to give judgment as to how the question of the vesting or non-vesting in the trustee of a bankrupt's personal earnings ought now to be decided. I have no doubt upon the point, but it is unnecessary to decide it.

BUCKLEY L.J. In this case the Master ordered the plaintiff, who is an undischarged bankrupt, to give security for costs; Scrutton J. reversed the Master's order; from that reversal the defendants appeal to this Court and ask that security be ordered. The argument has been involved, and its ground perpetually shifting. Several of the points taken do not arise.

The matter stands thus. Upon the ipsissima verba of s. 44 of the Bankruptcy Act, 1883, property passing to the trustee in bankruptcy comprises all the property coming to the bankrupt before his discharge; every sixpence that he may earn is included. But long ago an exception was engrafted upon this rule. In *Ex parte Vine, In re Wilson* (1) James L.J. said: "The general principle always has been that, until a bankrupt has obtained his discharge, all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living. On that principle the trustee could not sue for moneys due to the

(1) (1878) 8 Ch. D. 364.

bankrupt in respect of his personal labour, and, if the bankrupt could sue for them only for the benefit of his trustee, he would really be without remedy." Again, in *Emden* v. *Carr* (1), Fry J., who was deciding that a particular fund was not one in respect of which the bankrupt could sue alone, held that the debt was not merely the personal earnings of the bankrupt, but was a remuneration for professional services, and he adopted the passage cited from Smith's Mercantile Law by Willes J. in *Kitson* v. *Hardwick* (2), which runs thus: "The trustee takes not merely the bankrupt's personal property, but also all such as may be acquired by or devolve on him during the continuance of the bankruptcy. He has, however, an interest in it subject to this right, and is entitled to recover it from strangers if the trustee do not interfere, which he may do even after the bankrupt has commenced an action for the property." But he also approves of this passage: "The trustee, indeed, has no right to seize the profits of his personal and daily labour, for that would be to deprive him of the means of existence." No doubt from that passage, and especially from the phrase "personal and daily labour," the expression "periodicity" has taken its origin. Counsel for the defendant cited the judgment of Wright J. in *Mercer* v. *Vans Colina* (3) as shewing that nothing could be in the nature of personal earnings unless the quality of periodicity attached to it. And in *Shoolbred* v. *Roberts* (4) Phillimore J. said: "I adopt the view which I consider to have been taken by Wright J. in *Mercer* v. *Vans Colina* (3), that there must be at least an element of periodicity in the earnings." I confess myself unable to understand the ground upon which money, which is the result of the personal labour of the bankrupt, is not "personal earnings" merely because the bankrupt does not get employment more or less continuous with the result that there is no "periodicity" in the payments made to him. If this were so, the money paid to a village carpenter who only gets an occasional job would not be his personal earnings.

The only provision in the Bankruptcy Act, 1883, which throws light upon the subject is s. 53, sub-s. 2, which deals with a

(1) 17 Ch. D. 169.
(2) (1872) L. R. 7 C. P. 473, at p. 479.
(3) [1900] 1 Q. B. 130, n.
(4) [1899] 2 Q. B. 560.

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particular subject-matter in a particular way, and enacts that "where a bankrupt is in the receipt of a salary or income other than as aforesaid . . . . the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, ... or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct." The relevant words of the sub-section are "salary" and "income," and the trustee can only get the money upon an application to the Court. If the circumstances are such as are contemplated by s. 53, sub-s. 2, the application of the trustee must be made to the Court having jurisdiction in bankruptcy, but the present proceeding is a common law action. *In re Roberts* (1) was an application in bankruptcy, and the question was raised whether the bankrupt or the trustee was entitled to certain billiard balls; it was held that the trustee was so entitled; but the case is of no use for our present purpose. Moreover, it was one of the facts in that case that the property was not wanted for the bankrupt's support or maintenance; the trustee would therefore be entitled to the whole of it. It is obvious that that case does not decide that the trustee in bankruptcy may in every case intervene in a common law action. In the course of his judgment Lindley M.R. said: "It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions, if such money is required by him for his personal support and maintenance: see *Williams* v. *Chambers*." (2) That is precisely in point. He goes on, "the pleadings in which however, alleged promises to pay to the assignees for work done by the bankrupt. The Bankruptcy Act of 1883, like previous Bankruptcy Acts, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt, and he must live to use such tools and acquire such property. The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do so; and the language of s. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live."

(1) [1900] 1 Q. B. 122. (2) 10 Q. B. 337.

In *In re Graydon, Ex parte Official Receiver* (1), it was held, as stated in the head-note, that "the principles which underlie s. 53 of the Bankruptcy Act, 1883, with respect to the 'salary or income' of a bankrupt, are also applicable to his personal earnings. In each case it is a question of amount, and he will be allowed to retain only such a sum as is sufficient for the reasonable maintenance of himself and his family, and the residue will pass to his trustee in bankruptcy." The case of *Emden* v. *Carte* (2) was relied on by the defendants as shewing that the plaintiff in the present case was merely a nominal plaintiff; it proves nothing of the sort. That case was decided on the footing that the money was professional earnings, the result of the plaintiff's skill; it was not decided that the plaintiff could not maintain the action, though it was decided that his trustee in bankruptcy must be joined as a co-plaintiff. In that case both the plaintiffs had an interest in the money; but the one with the paramount interest was the bankrupt, and the trustee was only entitled to the surplus remaining after the prior right of the bankrupt had been satisfied. In the present action it has been sworn that the whole sum is wanted for the maintenance of the bankrupt, and under the circumstances it is impossible to say that he is merely a nominal plaintiff suing for the benefit of another person. It was on the ground that he was a nominal plaintiff that security was ordered by the Master. I do not say what ought to be done in cases where no part of the money sued for is required for the bankrupt's maintenance. The substantial question in the case is, whether this money is personal earnings: if it is, the defendants' counsel admits that the case is unarguable. I am clearly of opinion that it is personal earnings; none the less because the money is the result of a single personal job with no element of periodicity, or periodical payment, about it. In fact, the distinction attempted to be founded on periodicity seems to me to be almost unintelligible. **I agree that the appeal must be dismissed.**

Kennedy L.J. I am of the same opinion. The whole of the argument has arisen from the desire of the defendants to obtain

(1) [1896] 1 Q. B. 417. (2) 17 Ch. D. 169.

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an order for the deposit by the plaintiff of 10*l.* as security for costs. The only ground upon which such an order could be justified would be that the plaintiff, an undischarged bankrupt suing upon a contract for the payment of commission, is only a nominal plaintiff. It is not disputed by the defendants' counsel that, if the plaintiff has himself any substantial interest in the result of the action, security cannot be ordered. Upon the facts I am clearly of opinion that he has more than a merely nominal interest. He is an undischarged bankrupt who is trying to earn a livelihood; he does that by earning commissions upon financial transactions; his whole earnings in the year come to 100*l.*, of which the 60*l.* sued for in this action is a part. I am content to base this question of the plaintiff's interest upon certain propositions which are undisputed. By s. 44 of the Bankruptcy Act, 1883, the trustee in bankruptcy has a general right to intervene. But on that general right of intervention there has been grafted an exception in favour of the personal earnings of the bankrupt, so far as those earnings are necessary for his support, and this exception has been recognized for at least a hundred years. It is true that the generality of s. 44 is emphasized by the fact that particular things are particularly excluded from its operation; but it is nevertheless clear that the Act does contemplate the possibility of the acquirement by an undischarged bankrupt of future property. In Wace on Bankruptcy, p. 208, the exception is thus stated: "To the generality of the trustee's right to intervene and claim property acquired by the bankrupt before his discharge, as divisible amongst his creditors, his personal earnings, to the extent necessary to support himself and his wife and family, form an exception. The Act, like its predecessors, excepts his tools and contemplates the acquisition by him of future property, and he must live to use such tools and acquire such property; it must therefore be construed, like previous Acts, so as to enable him to do so; and, clear and express as the language is, it is not to be taken so literally as to deprive him of the fruits of his personal exertions, which are necessary to enable him to live."

If any authority for that statement were required, *In re Roberts* (1) is sufficient. It is no new law, but the exception was

(1) [1900] 1 Q. B. 122.

there recognized, as it has been recognized for a century. In the present case I think that the argument has been complicated by a reference to s. 53, sub-s. 2, which deals with salary and income and analogous payments made to an undischarged bankrupt. It has been practically decided that salary is something which is computed by time, and that income is something ejusdem generis with salary: I need only refer to the cases of *Ex parte Bennett*, *In re Hutton* (1), and *In re Shine* (2) upon this point. I confess that s. 53 seems to me to have little bearing on the question of the plaintiff's right to be a substantial plaintiff in an action, a right which would exist whether s. 53, sub-s. 2, were in the Act or not. The question for us therefore is whether this commission is personal earnings. In my opinion it clearly is, and the plaintiff has a real and substantial interest in the result of the action, an interest which overrides that of the trustee in bankruptcy. No doubt in *Emden* v. *Carte* (3) Fry J. held that the trustee in bankruptcy had a substantial right of action, and the only reason for not substituting him for the original plaintiff was that that course could only be adopted by the consent of the parties, which was not forthcoming; the learned judge was therefore compelled to add the trustee as an additional plaintiff. There are expressions of that learned judge in his judgment as to the character of the earnings in certain cases there enumerated, but it is unnecessary to do more than refer to them. Drawing the inference of fact in the present case, as we are entitled to do, I have no doubt that anything that became due under this commission note fell under the expression "personal earnings"; and on the affidavits it is clear that the plaintiff had more than a nominal interest in this action.

It is further said that the trustee in bankruptcy withdrew his intervention. Speaking for myself, I do not see how the trustee can be compelled to go on, if he refuses to do so, and in such a case the plaintiff will be left to go on with his action alone in the ordinary way. In such a case it is clear that, if the plaintiff succeeds, the defendants will be protected in paying him. It is unnecessary to decide whether the trustee can withdraw his

(1) (1884) 14 Q. B. D. 301. (2) [1892] 1 Q. B. 522.
(3) 17 Ch. D. 169.

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intervention; he has to consider both his duty to the creditors and the question of personal earnings before he finally decides; and I should have thought that there was nothing to prevent such a withdrawal on his part. Under the circumstances, I think that on every ground this appeal should be dismissed. At the worst, the plaintiff has more than a nominal interest in the result of the action, and it is quite possible to contend that he has the whole interest.

Appeal dismissed.

Solicitors for appellants: *Cohen & Cohen.*
Solicitor for respondent: *C. F. Smith.*

W. J. B.

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[IN THE COURT OF APPEAL.]

MENTORS, LIMITED *v.* EVANS.

County Court—Practice—Remitted Action—Costs of Proceedings under Order XIV.—Discretion of Judge—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113, 116.

In an action brought in the High Court the plaintiffs applied for summary judgment under Order XIV. The defendant obtained leave to defend as to part of the claim on the terms of his paying the balance of 3*l.* to the plaintiffs, and the action was remitted to the county court. The defendant paid the 3*l.* to the plaintiffs, and the action proceeded. At the trial judgment was entered for the defendant with costs on the higher scale:—

Held, that the Court had a discretion under s. 113 of the County Courts Act, 1888, to order the plaintiffs to pay to the defendant the costs of the proceedings under Order XIV., notwithstanding that the plaintiffs had by those proceedings succeeded in obtaining satisfaction of a portion of their claim.

Decision of Divisional Court [1912] 1 K. B. 254, affirmed.

APPEAL from the decision of a Divisional Court (Bankes and Lush JJ.), reported [1912] 1 K. B. 254, dismissing an appeal from the Chester County Court.

The plaintiffs brought the action in the High Court to recover a sum of 20*l.* 9*s.* 11*d.* for goods sold, and applied for summary judgment under Order XIV. The defendant in his affidavit in

answer to that application admitted his liability for 3*l.*, and expressed his readiness to pay that sum to the plaintiffs or into Court as might be ordered. The Master made an order that the defendant should pay 3*l.* to the plaintiffs within two days, otherwise the plaintiffs to be at liberty to sign judgment for that amount, leave to defend as to the balance, the trial of the action to be before the county court of Chester. The defendant duly paid the 3*l.* to the plaintiffs, and the action proceeded in the county court for the balance. At the trial the judge gave judgment for the defendant with costs on the higher scale. On taxation on that judgment the plaintiffs carried in an objection to the items representing costs in the High Court proceedings on the ground that such items, by reason of the plaintiffs having obtained under Order xiv. leave to sign judgment against the defendant for the sum of 3*l.* unless paid within two days, were not properly liable to the defendant, as 3*l.* was recovered by the plaintiffs in the said action in the order for judgment. To this objection the registrar answered that, there being no express direction limiting costs, the defendant was entitled to the general costs of the action, and as the action was for over 20*l.*, he was entitled to High Court costs while the proceedings were in the High Court, notwithstanding that 3*l.* was actually recovered by the plaintiffs in the High Court. Upon taxation the registrar allowed the defendant his costs of the proceedings prior to the order remitting the action to the county court, and on appeal the county court judge affirmed his order. The plaintiffs appealed to the Divisional Court, who dismissed the appeal.(1)

The plaintiffs appealed to the Court of Appeal.

Ernest Pollock, K.C., and *Lort Williams*, for the plaintiffs. The registrar was wrong in giving to the defendant the costs of the proceedings under Order xiv. The plaintiffs, having recovered only a small sum under Order xiv., may not be entitled to their costs, but they certainly ought not to pay costs. The discretion to be exercised under s. 113 of the County Courts Act, 1888, is a judicial discretion, and it is impossible so to exercise it as to make the successful party pay the unsuccessful party's costs

(1) [1912] 1 K. B. 254.

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The registrar had no authority to deal with the High Court costs, notwithstanding *Bennett* v. *Drake* (1), which was a decision on another section of the Act.

Powell, K.C., and *Barrington Ward*, for the defendant, were not called upon.

VAUGHAN WILLIAMS L.J. This appeal does not come before us in a satisfactory form. I agree, however, with the judgment of the Divisional Court. But it is a great pity that the matter was not conducted with more precision. The present appellants were appellants also in the Divisional Court. It lay on them to produce the order made in the county court; they did not produce it. I suppose we ought to assume that it followed the proper form; but it ought to have been produced.

The question which arises here is a question of the jurisdiction of the county court judge to make the order which he did make; that is, an order which, the respondent says, whatever may be its form, was meant to carry, as part of the costs, the costs of the defendant in respect of the proceedings under Order XIV. It would be more satisfactory if I could see the order, but I may assume two things; first, that the order is drawn in such general terms as gave the defendant the costs of the proceedings under Order XIV. in the High Court. Apparently, from the judgment in the Divisional Court, the question there argued was as to jurisdiction and nothing else. Bankes J. prefaces his judgment by these words: "In my opinion this appeal must be dismissed. The question is whether the county court judge had jurisdiction to make the order as to costs which he did." The question arose on a review of taxation and upon an objection which I presume was as to the items of the costs of the Order XIV. proceedings. The items down to 16 deal with the summons under Order XIV., and the objection is that "such items (being costs in the High Court) by reason of the plaintiffs having obtained under Order XIV. leave to sign judgment against the defendant for the sum of 3*l.* unless paid within two days are not properly liable to the defendant as 3*l.* was recovered by the plaintiffs in the said action in the order for

(1) (1907) 97 L. T. 132.

judgment." I think there was not an order for judgment, at least only in a certain contingency. The registrar's answer to the objection is, "In my opinion this case is governed by the decision in *Bennett* v. *Drake*." (1) There being no express direction limiting costs the defendant is entitled to the general costs of the action. As it was over 20*l.* the defendant is entitled to his High Court costs while the proceedings were in the High Court, notwithstanding that 3*l.* was actually recovered by the plaintiffs in the High Court. As a fact, the defendant obtained leave to defend in the High Court, and it would be inequitable to deprive him of the costs of obtaining leave."

I have come to the conclusion that in the circumstances of this case the county court judge had jurisdiction to deal with these costs; whether he did deal with them in fact is not certain, for we have not seen his order.

One word about the summons under Order XIV. Generally speaking, when there is a summons under that Order, it ought really to state approximately the right figure which the applicant thinks he ought to have; it is not quite a proper way to leave the question of the costs of such a summons without any direction at all. If the case goes on, and the plaintiff only gets 50 per cent. of his claim, it is a pity if he gets judgment (and therefore costs) on the whole claim. Therefore I think that when the whole sum recovered is not the entire sum which was claimed there ought to be a specific order as to costs.

It is a pity, as far as the county court is concerned, that there is not a special order in this case, but only a general order giving the defendant the costs of the action. The county court judge has jurisdiction to do that; but it is unfortunate that he did not say in terms that he had given the costs of the summons under Order XIV. If one had to deal with such a matter in chambers in the High Court, it would be much safer and better if the judge or Master making the order, knowing what the effect is going to be, were in terms to direct that the costs of the proceedings under Order XIV. should be left to the discretion of the judge trying the case. It is clear that the county court judge had jurisdiction to make an order concerning the costs of the Order XIV.

(1) 97 L. T. 132.

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proceedings, but I think it a great pity that he did not say he was doing so.

FLETCHER MOULTON L.J. This appeal arises upon a taxation of costs. It is a fundamental principle in dealing with such appeals that the appellant is strictly tied to the objections made by him to the taxing Master and answered by the latter. Such a provision saves endless expense. I therefore turn to the particulars of taxation, and find that items 1 to 19 are objected to on the one ground that 3*l.* had been recovered by the plaintiffs on the order for judgment.

It is necessary to state the facts. The claim was for a little over 20*l.*, and was brought in the High Court; 3*l.* of this was admitted by the defendant to be due. The action was remitted to the county court, with an order that if the defendant did not pay 3*l.* to the plaintiffs within two days the plaintiffs should be at liberty to sign judgment for that amount. The action having been remitted under s. 65, the county court judge acquired seisin over the whole action. There is a provision in the Rules as to the scale of costs which shall apply; before the transfer the High Court scale applies, after the transfer the county court scale. But that does not affect the incidence of the costs, only the scale.

One would expect the county court judge, to whom the whole action has been transferred, to be in the same position as to costs as a judge in the High Court. But we are not left to speculate on the subject, for s. 113 of the County Courts Act, 1888, says, "All the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said Court." In this case, therefore, the county court judge at the trial was in a position in which he could deal with the costs of the action; therefore the costs before transfer are either costs in the action or are costs not otherwise provided for. In either view they are in his discretion, and he awarded them to the defendant; so this objection has no foundation.

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The appellants' counsel at first quarrelled with the order as being beyond the jurisdiction of the county court judge, on the ground that it was impossible for him in the exercise of a judicial discretion to give all the costs to the defendant because something had been recovered by the plaintiffs in the action. But he had finally to admit that it was within the jurisdiction of the county court judge to make the order. I think the Divisional Court were quite right on the simple ground that these costs are costs in the action, and that either the county court judge is in the same position as a judge of the High Court with regard to them, or these costs are costs not otherwise provided for.

Farwell L.J. I agree. When the case was sent to the county court judge he was substituted for a judge of the High Court, and all further orders must be made by him. The principal point is that taken by Mr. Pollock, that as the plaintiffs had succeeded as to the 3*l.* in the action there was no jurisdiction in the county court judge to order him to pay the whole of the defendant's costs. That point is disposed of by the decision in *Harris* v. *Petherick*. (1) Another point arises on the order that if the 3*l.* is not paid within two days the plaintiffs shall be at liberty to sign judgment for that amount: this order is altogether silent as to costs. The result is that the costs become costs in the action. If this were a case in the Chancery Division, I should have no doubt whatever. The practice as stated in the Annual Practice, at p. 1173, is founded on the Chancery cases there stated, and is to the following effect: "Where the order on the motion is silent as to costs, the following rules as to the costs being made costs in the cause have been laid down: —(1.) The party making a successful motion is entitled to his costs as costs in the cause, but the party opposing is not. (2.) The party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing is. (3.) When a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause. In my opinion the case falls within the second head, and the costs

(1) (1879) 4 Q. B. D. 611.

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become costs in the cause. Here the only order which took effect was the order for transfer, and when that was effected those costs were costs in the action. There is no reason why the county court judge, being in the position of a judge of the High Court, should not make an order covering these costs. In *White* v. *Headland's Patent Electric Storage Battery Co., Ld.* (1) an order was made under Order XIV. giving the plaintiff leave to sign judgment for 53*l.*, and giving the defendants leave to defend as to the residue of 20*l.*, and ordering that the action should be tried in the county court, where the plaintiff recovered the 20*l.* In his judgment A. L. Smith L.J. said: "I do not agree with the suggestion that, where that section [s. 65 of the County Courts Act, 1888] is applied in such a case as this, the action is cut in two, remaining as regards the portion of the claim for which judgment has been given under Order XIV. a High Court action, but becoming as regards the residue of the claim an action in the county court to which the action is remitted for trial. The words of the section altogether negative such a contention." And Chitty L.J. said: "I think there was in this case but one action, part of the proceedings in which took place in the High Court, and the remainder in the county court. I do not think that the action can be regarded as having been split into two as suggested. The plaintiff had recourse to Order XIV., while the action, which had been commenced in the High Court, was still pending there, and obtained an order which gave him judgment for a portion of his claim, but was silent as to costs." And at p. 512 the same learned judge said: "The result is that there was one action only in which the plaintiff recovered an amount exceeding 50*l.* As to so much of the proceedings as took place in the High Court, the costs will be taxed on the High Court scale, and, as to so much of the proceedings as took place in the county court, the costs will be taxed on the county court scale applicable where an amount exceeding 50*l.* has been recovered in the action"; that is to say, the county court judge's order as to costs included the costs of obtaining judgment. In my opinion the county court judge had jurisdiction to deal with the costs as to which

(1) [1899] 1 Q. B. 507.

the order was silent and to order payment of the same, and further to make the two claims into one claim, so that the total claim would be brought over 20*l*. I agree with the judgments in the Court below.

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Appeal dismissed.

Solicitor for plaintiffs: *W. M. Pyke.*

Solicitor for defendant: *E. A. Fuller, for Brassey, Chester.*

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May 16, 17, 22

Landlord and Tenant—Lease—Assignment of Reversion—Lease by Assignee—Attornment—Privity—4 & 5 Ann. c. 3 (c. 16 in the common printed Editions), s. 9.

By 4 & 5 Ann. c. 3 (commonly known as c. 16), s. 9, all grants or conveyances by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending as if their attornment had been had and made. By s. 10 it is provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee.

Certain owners of land made a lease to the plaintiff for three years. They then assigned their reversion. The assignees of the reversion made a lease to the defendant to take effect in præsenti for twenty-one years.

A quarter's rent being unpaid by the defendant:—

Held, that by virtue of the above enactment the plaintiff could sue the defendant before attornment for the quarter's rent.

Edwards v. *Wickwar* (1866) L. R. 1 Eq. 403, not followed.

APPEAL from the Westminster County Court.

The facts are stated at length in the judgment of the Court delivered by Lush J. The following is a short statement sufficient to indicate the point decided.

The defendant was tenant of a flat in Jermyn Street for a term

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of three years from Midsummer, 1908, at a yearly rent of 160*l.* His lessors were Messrs. Adams and Biggs, who were the freeholders. The defendant regularly paid his rent to a firm of solicitors, Messrs. Le Brasseur & Oakley, who acted as agents for Adams and Biggs, the lessors. Adams and Biggs mortgaged their reversion to the Yorkshire Penny Bank, who went into possession and made a lease for twenty-one years to the plaintiff to take effect in præsenti.

The defendant knew nothing of the mortgage to the bank or of the lease by the bank to the plaintiff. When the defendant took his lease the plaintiff was manager of the flats and was known to the defendant in that and in no other capacity. When the plaintiff became lessee to the Yorkshire Penny Bank, Le Brasseur & Oakley acted as agents for him and continued to receive the rent paid by the defendant.

In October, 1910, certain building operations were being carried on in adjoining premises. The defendant complained that they constituted a nuisance and made his flat uninhabitable. He wrote to Messrs. Le Brasseur & Oakley saying that he would not pay the rent due on December 25, 1910.

In November, 1910, the plaintiff offered to pay the defendant 40*l.*, 20*l.* down and 20*l.* at the end of the defendant's lease, for the right to let the flat if he could find another tenant. The defendant, supposing, as he said, that the plaintiff was still acting as manager of the flats, accepted the offer.

Soon after Midsummer, 1911, when his lease terminated, the defendant claimed the 20*l.* payable under the agreement. The plaintiff then brought an action in the county court for 40*l.*, being rent for the quarter ending December 25, 1910, which had not been paid, and giving credit for the 20*l.* due under the agreement. The defendant denied that the plaintiff was his landlord and on that footing counterclaimed for that 20*l.* In the alternative, if it should be held that the plaintiff was his landlord, he claimed damages for eviction and disturbance.

The county court judge gave judgment for the plaintiff on the claim and counter-claim. As to the claim he held that there had been an attornment by the defendant to the plaintiff and that the rent was therefore due. As to the counter-claim he held on the

facts that the agreement of November, 1910, by the plaintiff to pay the 40*l.* was partly in consideration of the inconvenience which the defendant had suffered through the building operations.

The defendant appealed.

As appears from the judgment below, the Court, differing from the county court judge, held that there was no evidence of any attornment by the defendant to the plaintiff. As to the counter-claim they found no evidence that the agreement of November, 1910, had any reference to the disturbance or eviction of the defendant.

The only point of law argued was whether in order to entitle the plaintiff to recover the rent due on December 25, 1910, an attornment by the defendant was necessary.

Goodman, for the defendant. Unless and until he attorns, a lessee incurs no liability to pay rent or observe covenants towards a lessee for a longer term subsequently granted: *Edwards* v. *Wickwar*, (1) The second lessee is not an assignee of the reversion, but has only an interesse termini. The first lessee remains liable to his original lessor. It is true that in certain cases an attornment is not necessary by virtue of 4 & 5 Ann. c. 3, s. 9 (2), but that enactment only deals with grants and conveyances by fine or otherwise of manors or rents or of the reversion or remainder of messuages or lands, and applies only to conveyances of the freehold. The creation of a mere interesse termini, or even of a lease of the reversion, is not within the contemplation of the enactment. Therefore the defendant remained liable to Adams

(1) L. R. 1 Eq. 403.

(2) 4 & 5 Ann. c. 3 (c. 16 in the common printed editions), s. 9: "All grants or conveyances thereafter"—i.e., after the first day of Trinity Term, 1706—"to be made by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending as if their attornment had been had and made."

Sect. 10: "Provided nevertheless that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee."

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and Biggs, and there never was any privity between the defendant and the plaintiff.

Carthew, for the plaintiff. In *Edwards* v. *Wickwar* (1) the statute of 4 & 5 Ann. c. 3 was not referred to. This is noted in the report of the case in the *Law Journal*. (2) The case is therefore really no authority for the defendant.

The question is whether the plaintiff is an assignee of the reversion on the defendant's lease. Clearly he is: *Wright* v. *Burroughes*. (3) There is nothing to limit s. 9 of the statute of 4 & 5 Ann. c. 3 to conveyances of the freehold. The lease by the mortgagees of November, 1910, was a grant of the reversion of lands within the meaning of that section.

Goodman in reply.

Cur. adv. vult.

May 22. The judgment of the COURT (Ridley and Lush JJ.) was read by

LUSH J. This was an appeal by the defendant from a judgment of the learned judge of the Westminster County Court. The claim was to recover 40*l*., one quarter's rent of a flat, for the quarter ending Christmas, 1910, less 20*l*. which the plaintiff admitted was due to the defendant under an agreement. The defence was that the plaintiff was not the defendant's landlord. The defendant counterclaimed for the 20*l*., and also, in the event of the plaintiff establishing that he was the defendant's landlord, for damages for disturbance, alleging that during the quarter in question the premises had been uninhabitable owing to building operations which had been carried on in adjoining premises, and he further in the alternative alleged that an agreement had been entered into between him and the plaintiff's agents in November, 1910, whereby the plaintiff agreed to release the defendant from the payment of the rent sued for by reason of the disturbance. The learned judge gave judgment for the plaintiff both on the claim and counter-claim with costs. The facts are as follows.

The defendant was originally the tenant of the flat to two

(1) L. R. 1 Eq. 403. (2) 35 L. J. (Ch.) 309.
(3) (1846) 3 C. B. 685.

persons named Adams and Biggs. They mortgaged their reversion to a bank, who foreclosed. The defendant's tenancy expired in June, 1911. The mortgagees during the currency of the defendant's tenancy granted a lease of the flat to the plaintiff (who had up to that time been manager of the flats) for twenty-one years, determinable at the end of the seventh and fourteenth years. The lease was a lease commencing in praesenti. It was not expressed to be subject to the lease to the defendant, but the existence of that lease was known to both the plaintiff and to his lessors. The rents of the flats had been originally collected by Messrs. Le Brasseur & Oakley, a firm of solicitors, on behalf of Adams and Biggs, the defendant's lessors, but after the lease to the plaintiff that firm had apparently collected them on the plaintiff's behalf. The plaintiff had, as appears from the correspondence, been making arrangements with one or more of the tenants of the flats with a view to releasing them and reletting their flats, and in November, 1910, an arrangement was made in writing between the plaintiff and the defendant whereby the plaintiff agreed to pay 40*l.* to the defendant, 20*l.* down and 20*l.* at the end of the defendant's tenancy, the plaintiff to have the right, if he could find a tenant, to relet the premises. The agreement, however, was to "stand," which appears to mean that the defendant would still remain liable for his rent during the remainder of his tenancy. The defendant, when he made that arrangement, supposed, as he said, that the plaintiff was still acting as manager of the flats. The first 20*l.* was duly paid: it is the second 20*l.* for which credit was given in the particulars of claim and for which the defendant counterclaimed. The rent due for the quarter Michaelmas to Christmas, 1910 (which was the rent in dispute), was claimed in the usual way from the defendant by Messrs. Le Brasseur & Oakley, but the defendant declined to pay it on the ground that he had been unable to occupy the flat during that quarter owing to the building operations above referred to, and Messrs. Le Brasseur & Oakley wrote to the defendant on February 8, 1911, stating that the defendant's proper course would be to "obtain compensation from Mr. Horn," the plaintiff, and that the owners of the premises (where the building operations had been going on) had

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agreed to compensate Mr. Horn in respect of any loss he might sustain through the disturbance caused by those operations. The defendant replied on February 12 that he did not see what Mr. Horn, the plaintiff, had to do with it, as his lease was granted by Adams and Biggs, and he stated that any arrangement made between them and Mr. Horn did not concern him, the defendant. Neither the plaintiff nor Messrs. Le Brasseur & Oakley ever told the defendant during the currency of the defendant's lease that the plaintiff had taken the lease and become the reversioner, and the plaintiff's name did not appear in the receipts for the two subsequent quarters' rent, December, 1910, to June, 1911, which was paid, as before, by the defendant to Messrs. Le Brasseur & Oakley. In fact all the evidence which was before the learned county court judge (which consisted mainly of the correspondence) points to the fact that the defendant was in complete ignorance of the lease to the plaintiff, or of any change having been made in the reversion expectant on the determination of his lease. When the defendant's tenancy came to an end in June, 1911, the second instalment of 20*l.* which the plaintiff had agreed to pay became due, but it was not paid. The defendant on August 2, 1911, wrote to the plaintiff asking for a cheque. The plaintiff replied on August 8 admitting that it was due, but stated that the quarter's rent, Michaelmas to Christmas, 1910, had apparently not been paid, and he asked if that was so. In that letter the plaintiff for the first time stated that Messrs. Le Brasseur & Oakley had been collecting the rents for him. The defendant replied that he had not paid the rent for that quarter, and stated that he had explained to Messrs. Le Brasseur & Oakley that the flat had not been habitable during that period, and that they admitted it, but he added "that does not concern you," stating again that his agreement was with Adams and Biggs. The plaintiff in reply then for the first time stated that he had taken a lease of the flat and had held it for three years, and that Adams and Biggs had no longer anything to do with it, and he said that he would pay the 20*l.* when the rent was paid by the defendant for the quarter ending Christmas, 1910. A claim was then made by the defendant's solicitors for the 20*l.*, and the result was a plaint note in the county court by the plaintiff

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for the rent, 40*l.*, less 20*l.* credited, to which the defendant counterclaimed as above mentioned.

On these facts the plaintiff contended before the learned county court judge that the defendant had attorned and become his tenant. This the defendant denied. The learned judge held that the defendant had negotiated with the plaintiff as his landlord in respect of the building operations, and that the correspondence with the plaintiff as his landlord amounted to an attornment entitling the plaintiff to sue for the rent. We do not think that on the correspondence there is any sufficient evidence of an attornment. It appears to us that the correspondence shews the contrary. The defendant more than once asked for information as to what the plaintiff's interest in the premises was, and never could obtain an answer until after the tenancy had come to an end, and the plaintiff, in our opinion, failed to establish an attornment.

Before us, however, Mr. Carthew, on behalf of the plaintiff, contended that by reason of the statute 4 & 5 Ann. c. 3 no attornment was necessary. He contended that the lease from the mortgagees to the plaintiff was the grant of a reversion within the meaning of the statute, and that therefore the necessity of an attornment was dispensed with. We are of opinion that this contention is well founded. The statute says that "all grants or conveyances thereafter to be made by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants . . . . as if their attornment had been had and made." It is not possible now, having regard to the authorities, to contend that a lease for years is not the grant of a reversion expectant on the determination of an existing shorter term if the lease is made to take effect in praesenti. In Platt on Leases, vol. 2, pp. 57 and 58, the following passage occurs: "When, during a subsisting lease, a second lease is made, to commence immediately, for a longer term than the unexpired estate under the former, it is concurrent with the former in point of interest and computation of time, and operates as an immediate lease of the reversion. Before the statute of Anne (4 & 5 Anne, chapter 3), section 9,

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such a lease, unaccompanied by attornment, would have operated as a grant of a future interest in reversion, conferring an interesse termini only, the reversion remaining in the grantor; but if the first lessee attorned, a reversion in respect of that lease would have passed, conferring on the grantee a right to the rent payable by such first lessee; and it is apprehended that such second lease would now, in general, pass a reversion, together with a right to the rent under the former lease, without attornment, that ceremony having been rendered unnecessary by the statute referred to." In the case of *Birch* v. *Wright* (1) Buller J. says: "The statute enacts, that all grants or conveyances thereafter to be made by fine or otherwise, of any manors, rents, reversions, or remainders, shall be good and effectual to all intents and purposes, without any attornment of their tenants, as if their attornment had been made. This clause comprehends all grants and conveyances, and therefore whether it be a grant by way of mortgage, or of the fee simple, or only of the reversion for a term of years, as in the present case, it makes no difference. And the effect of the clause is, that it creates an immediate privity between the grantee and the tenant." See also the summing up of Parke B. in *Harmer* v. *Bean* (2), and the case that was cited to us of *Wright* v. *Burroughes*. (3) Sir W. Page Wood V.-C. appears to have held the contrary in *Edwards* v. *Wickwar* (4), but in a note to the report of the same case in the *Law Journal* (5) it is pointed out that the statute was not cited in the argument in that case, so that the decision is not really a decision to the contrary. That being so, the plaintiff established his right to maintain the action.

With regard to the counter-claim, however, the learned county court judge held that the 40*l*. was paid by the plaintiff to the defendant as a solatium for his loss of the use of the flat during the quarter in question. In our opinion there was no evidence to support this finding. The reason why it was paid appears from the plaintiff's own letters, and it seems to us, with all respect

(1) (1786) 1 T. R. 378, at p. 384.
(2) (1853) 3 Car. & K. 307.
(3) 3 C. B. 685.
(4) L. R. 1 Eq. 403.
(5) 35 L. J. (Ch.) 309.

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to the learned county court judge, plain that it was paid for the right which the plaintiff acquired to relet the flat, and had nothing to do with the disturbance. If, as we think is shewn to be the fact by the correspondence, the defendant was not aware of the fact that the plaintiff had become his lessor, it is clear that he was not bargaining with the plaintiff as to compensation which he claimed and could claim only from his landlord, and the correspondence with regard to the compensation began some weeks after the 10*l.* was agreed to be paid, namely, in February, 1911. In our opinion the question as to the defendant's right to damages for the disturbance has not been satisfactorily dealt with, and we think that there ought to be a new trial as to the counter-claim. We also think that it ought to be open to the defendant again to go into the question whether he made a concluded contract with Messrs. Le Brasseur & Oakley whereby he became released from the rent for the Christmas quarter. The learned judge no doubt negatived this contention, but he did so after coming to the conclusion that the 10*l.* included the compensation. It is not an unimportant fact that Messrs. Le Brasseur & Oakley, with whom the agreement is alleged to have been made, made no further demand for the Christmas quarter's rent in question, but did claim, and were paid, the two subsequent quarters' rent.

Under all the circumstances we think that all the costs should abide the event of the new trial.

Appeal allowed.

Solicitor for appellant: *C. E. Soames.*

Solicitors for respondent: *Le Brasseur & Oakley.*

W. H. G.

1912
July 9.

THE KING *v.* THE GOVERNOR OF BRIXTON PRISON. *Ex parte* MEHAMED BEN ROMDAN.

Extradition—"Committed to prison"—Arrest under Warrant—Proceedings before Magistrate pending—Lapse of Two Months after Arrest—Right of Prisoner to Release—Extradition Treaty of 1876 *with France, art.* 10.

By art. 10 of the Extradition Treaty of 1876 between the United Kingdom and France, "if the fugitive criminal who has been committed to prison be not surrendered and conveyed away within two months after such committal, or within two months after the decision of the Court upon the return to a writ of habeas corpus in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shewn to the contrary":—

Held, that "committed to prison" meant the committal of the accused person to prison by the magistrate, upon the conclusion of the proceedings before him, to await the warrant of the Secretary of State for his extradition, and did not mean the arrest of the accused under the warrant issued by the magistrate in the first instance; and therefore the accused is not entitled to be discharged from custody merely because he has not been surrendered and conveyed away within two months after his arrest under the magistrate's warrant.

Rule calling upon the governor of Brixton Prison to shew cause why a writ of habeas corpus should not issue directed to him to bring up the body of Mehamed Ben Romdan, with a view to obtaining his release from prison.

On April 30, 1912, Mehamed Ben Romdan, who was a French subject, was arrested under a warrant (called a provisional warrant) issued under s. 8, sub-s. 2, of the Extradition Act, 1870 (33 & 34 Vict. c. 52), by one of the magistrates of the metropolitan police court in Bow Street upon an information laid by a representative of the French ambassador in London, upon telegraphic instructions from the French Minister for Foreign Affairs, charging the prisoner with forgery and larceny in Tunis, within the jurisdiction of the French Government. On May 7, 1912, the French ambassador in London, under art. 9 of the Extradition Treaty of 1876 between the United Kingdom and France, duly sent a requisition to the Secretary of State for Foreign Affairs for the extradition of the prisoner. Since his arrest the prisoner had been remanded at Bow Street Police Court from time to time in

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custody, the solicitor who represented the French Government having informed the magistrate on each occasion that the papers necessary to complete the evidence against the prisoner had not arrived in this country.

The proceedings before the magistrate were still pending, and the magistrate had not committed the prisoner to await extradition, when on July 2, 1912, an application was made to the magistrate on behalf of the prisoner for his release from custody upon the ground that more than two months had elapsed since he had been arrested and committed to prison under the warrant, and that therefore he was entitled, under art. 10 of the Extradition Treaty of 1876 with France (1), to be discharged from custody. The magistrate declined to order the prisoner's release, and this rule nisi for a habeas corpus was thereupon obtained.

S. A. T. Rowlatt (*Sir Rufus Isaacs, A.-G.*, with him) shewed cause. The words of art. 10 of the Extradition Treaty with France, "committed to prison," do not refer to the arrest of the accused person under the warrant issued by the magistrate for his apprehension in the first instance. The words refer to the committal by the magistrate to prison, when the proceedings before him have been concluded, to await the warrant of the Secretary of State for the prisoner's surrender to France. Art. 10 does not refer to the case of a prisoner who is under remand before the magistrate in extradition proceedings. The distinction between the original apprehension of the accused person under a warrant issued by a magistrate and his committal to prison to await extradition is recognized throughout the Extradition Act, 1870, and the Extradition Treaty of 1876 with France. In ss. 7 and 8 of the Act the arrest of the accused under the warrant is referred to as his "apprehension." But when the Act in s. 10 deals with the duty of the magistrate after having

(1) The Extradition Treaty of August 14, 1876 (ratified on April 8, 1878), between the United Kingdom and France, art. 10: "If the fugitive criminal who has been committed to prison be not surrendered and conveyed away within two months after such committal, or within two months after the decision of the Court upon the return to a writ of habeas corpus in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shewn to the contrary."

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heard the evidence, it provides that, if such evidence is produced as would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the magistrate "shall commit him to prison, but otherwise shall order him to be discharged," and the last clause of the section shews that, if the magistrate commits the prisoner to prison, he commits him to await the warrant of a Secretary of State for his surrender. Sect. 11 also uses the expression "commits to prison" in the same sense; and s. 12 provides that "if the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, it shall be lawful" for a judge "to order the criminal to be discharged out of custody, unless sufficient cause is shewn to the contrary." The expression "committed to prison" in s. 12 clearly refers to the committal by the magistrate to await the warrant of the Secretary of State for the prisoner's surrender. The treaty follows the language of the Act in drawing a distinction between the "apprehension" of the accused person under the magistrate's warrant in the first instance and his final "committal to prison" to await extradition after the evidence has been concluded. Art. 7, clause (A), speaks of the fugitive being "apprehended" under the magistrate's warrant, and then, following s. 10 of the Act, it provides that if the evidence shall be such as to justify, according to the law of England, the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the magistrate "shall commit him to prison to await the warrant of the Secretary of State for his surrender"; and clause (D) gives the prisoner the right to apply for a writ of habeas corpus. Art. 9 also uses the word "apprehended" as meaning the arrest under the magistrate's warrant. Then comes art. 10, which substantially reproduces s. 12 of the Act. The expression "committed to prison" there must mean the final committal to prison to await extradition. This is clear from the succeeding words in the article, "or within two months after the decision of the Court upon the return to a writ of habeas corpus." The only writ of

habeas corpus is that referred to in ss. 11 and 12 of the Act, and art. 7, clause (D), of the treaty, namely, the writ which the prisoner is entitled to apply for within fifteen days after his committal to prison to await an order for his surrender. No doubt in the French version of the treaty the word "arrêté" is used as being the equivalent both for "apprehended" in art. 7, clause (A), and art. 9, and for "committed to prison" in art. 10, but the word "arrêté" is not the correct equivalent for "committed to prison" in art. 10. Moreover the Court can only look at the English version of the treaty. The two versions are both originals, one for use in this country and the other for use in France. In an English Court the English version is the only document that can be looked at, unless indeed there is some ambiguity about the English version, when possibly the French version may be looked at to see if the ambiguity can be cleared up. A similar provision occurs in s. 7 of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), where the words are "committed to prison . . . . to await his return." The words "committed to prison" in art. 10 mean the final committal to await extradition, and the two months run from that date. The form of the warrant of committal in Sched. II. to the Extradition Act, 1870, confirms this. The proceedings before the magistrate in the present case have not concluded, and therefore the time has not arrived for him to consider whether he will commit him to prison to await extradition. There is no provision in the treaty with France, as there is in some of the treaties with other countries, that if sufficient evidence for extradition is not produced within two months from the date of his apprehension he shall be set at liberty. The rule ought therefore to be discharged.

Abinger, in support of the rule. The Courts of this country have always jealously guarded the rights of accused persons, so that they shall not be kept in custody for an indefinite period unless there is some good reason for it. In the extradition treaties with Germany, Italy, Russia, and some other countries there is a provision that if sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive he shall be set at liberty, though no doubt in the treaty of 1878 with Spain there is no such

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provision, art. 9 of that treaty corresponding with art. 10 of the treaty with France. It must be assumed that the two contracting parties to the treaty of 1876 were ad idem, and therefore it is permissible to look at the word "arrêté" in the French version, and when one sees that that word is used as the French equivalent for "apprehended" under the warrant of arrest (art. 7, clause (A), and art. 9) and also for "committed to prison" (art. 10), the natural presumption is that those two expressions were intended to refer to the same thing, namely, the arrest of the accused person under the warrant issued by the magistrate. The accused person is "committed to prison" when he is first arrested under the magistrate's warrant. If this construction of the words "committed to prison" in art. 10 is correct, the treaty with France will be brought into harmony with the treaties with most other countries. The contention of the other side comes to this, that the expression "committed to prison" in art. 10 is the same as "committal for trial" in art. 7, clause (A), whereas the French equivalents are quite different. The word "arrêté" in art. 10 does not mean committed to prison to await extradition; it means apprehended under the magistrate's warrant before the proceedings before the magistrate have commenced. If this is not the true meaning of "committed to prison" in art. 10, there is no time specified within which the proceedings before the magistrate must be concluded. The rule should be made absolute.

DARLING J. In my opinion this rule must be discharged. The question turns upon the meaning of the words "committed to prison" in art. 10 of the Extradition Treaty of 1876 with France. That article provides that "if the fugitive criminal who has been committed to prison be not surrendered and conveyed away within two months after such committal, or within two months after the decision of the Court upon the return to a writ of habeas corpus in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shewn to the contrary." The prisoner was arrested on April 30, 1912, under a warrant issued by a metropolitan police magistrate at Bow Street, and he was remanded from time to time, and on July 2,

more than two months after his arrest under the warrant, while the proceedings were still pending before the magistrate, an application for his release was made to the magistrate under the provisions of art. 10 and was refused. This rule was accordingly obtained.

It is contended on behalf of the prisoner that the words "committed to prison" mean committed to prison upon his arrest under the warrant for the purpose of being brought before a magistrate. It is contended on the other hand that the words mean the committal to prison, after the magistrate has heard the evidence in the case, to await the prisoner's surrender to the officer of the French Government. In my opinion the latter is the true meaning of the words. I do not think that there would be any difficulty having regard to the words which immediately follow these in question, "or within two months after the decision of the Court upon the return to a writ of habeas corpus in the United Kingdom," were it not for the fact that the treaty is framed in two languages, English and French. If I had regard only to the French version of the treaty I must admit that I should have come to a different conclusion from that at which I have arrived. I do not know whether we ought to look upon the French version as an original document or as a translation of the English version. If the English version was first drawn up the person who reproduced it in French, however well acquainted he may have been with the French criminal law, was not thoroughly acquainted with criminal procedure in this country, because he used the French word "arrete" as meaning two different things. For instance, in art. 7, clause (A), and art. 9 the word "arrete" is used as being equivalent to the English word "apprehended," that is to say, apprehended under the warrant for the purpose of being brought before the magistrate. That probably is a correct translation of the word "apprehended." In art. 10 the word "arrete" is used as being equivalent to "committed to prison." When, however, the author of the French version came to deal with the English expression "the committal for trial of the prisoner" in art. 7, clause (A), he used the proper French equivalent, "la mise en jugement du prisonnier." That would tell against the contention of the Crown if the

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Darling J.

expression in art. 10 "committed to prison" meant the same as committed for trial. But the two expressions do not mean the same thing. The magistrate does not commit a fugitive criminal for trial. He simply commits a fugitive criminal to prison to await the warrant of the Secretary of State for his surrender to the officer of the French Government. The prisoner may or may not be brought to trial. No doubt the construction which we are placing upon art. 10 of the treaty makes the procedure under it in this respect different from that under the extradition treaties with Germany and some other countries. But this Court cannot take that into consideration. We have only to construe this treaty, and it is no part of our duty to bring the various treaties into harmony. We are, in my opinion, bound to take the English version of the treaty as being the authentic version which the Courts of this country must consider, and, that being so, I think that the words "committed to prison" in art. 10 mean the committal by the magistrate to await extradition, and not the arrest of the prisoner under the warrant issued by the magistrate in the first instance. The rule must therefore be discharged.

CHANNELL J. I am of the same opinion. I base my judgment on the ground that the English version of the treaty shews that the words "committed to prison" in art. 10 refer to the final committal of the prisoner by the magistrate to prison after he has heard the case, to await the warrant of the Secretary of State for his surrender. It is true that under the treaty as so construed it is possible to keep the prisoner in custody for a time which is nowhere defined, and there seems to be no special provision to meet the case of the preliminary proceedings before the magistrate being unreasonably protracted. But it is to be observed that when a person is arrested in this country for an offence alleged to have been committed here, and is brought before a Court of summary jurisdiction, there is nothing to prevent him from being kept in custody for a considerable length of time on remand. If, however, in such a case the preliminary proceedings were unreasonably protracted, I have no doubt that an application could be made on behalf of the accused for a writ of habeas corpus for the purpose of obtaining

his release from custody. So too a writ of habeas corpus would, in my opinion, lie in the case of the unreasonable prolongation of the preliminary proceedings before the magistrate under the Extradition Treaty with France. No doubt in some of the extradition treaties with foreign countries there is an express provision that the accused shall be released if the proceedings before the magistrate are not concluded within a certain time, but there is no such provision in the treaty with France. But though this treaty itself gives no protection in such a case, the Courts of this country would give the same protection to French subjects and others who are proceeded against under the treaty here as they would give to British subjects and others charged with offences in this country. Accordingly there seems to me to be no reason for placing upon the words of art. 10 of the treaty, "committed to prison," a construction different from that which we are placing upon them. Looking at the English version of the treaty alone, I have come to the conclusion that those words upon their true construction mean, as I have said, the final committal to prison to await extradition. We ought not, in my opinion, in construing the treaty to use any knowledge which we may have of the French language. If we had to construe an extradition treaty with a country with whose language we were not familiar we could only look at the English version of the treaty. It is a mere accident that the members of the Court are more or less familiar with the French language. If, however, I may look at the French version, I agree that the author of it was not so familiar with the English system of procedure as the author of the English version was, because he used the one word "arrêté" to describe two steps in the procedure which are quite distinct. If I had to look at the French version alone I should probably not have arrived at the conclusion at which I have now arrived. But I think that we ought not to look at the French version.

Rule discharged.

Solicitor shewing cause: *Director of Public Prosecutions.*
Solicitors in support of the rule: *Charles Lumley & Co.*

W. F. B.

1912
May 11, 23.

CLINTON *v.* J. LYONS & COMPANY, LIMITED.

Negligence—Savage Animal—Liability of Owner—Duty towards Licensees—Remoteness of Damage.

The plaintiff, accompanied by her husband and carrying a pet dog, entered a tea shop by permission of the defendants, the proprietors thereof. On the premises was a cat which had kittens. The cat had been shut up in a store room, but had escaped. The plaintiff put her dog on the floor. The cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband. The cat sprang on her and bit her arm. Evidence was given that cats rearing kittens are inclined to be savage and in a vicious state, even if gentle otherwise; and that if such a cat smelt the clothing of a person who had been carrying a dog it might attack that person.

In an action for injuries to the plaintiff and to her dog:—

Held, that the defendants were not liable, either (1.) as keepers of an animal feræ naturæ, or of an animal mansuetæ naturæ but known to be vicious towards mankind; or (2.) as licensors.

Held, also, that the defendants were not bound to contemplate the injuries as the consequence of keeping the cat.

Appeal from the Westminster County Court.

The defendants were restaurant keepers and proprietors of a number of establishments for tea and refreshments.

The plaintiff, a married woman, claimed damages for personal injuries and for injuries to a dog which she owned, received in a tea shop of the defendants' in Victoria Street, Westminster, in the circumstances mentioned below.

The following statement of the facts is taken from the written judgment of Ridley J.

It appeared that the plaintiff, with a Pomeranian dog in her arms, went into the tea shop accompanied by her husband. There was a cat on the premises which had kittens. The plaintiff said she put her dog on the floor, and the cat, which in some way had got out of a store room where it was shut in, sprang on the dog and bit it. There was evidence that the dog had been smelling at the door of the store room, but the jury found that the cat was not provoked. The plaintiff interfered to save the dog, and picked it up and gave it to her husband. Then the cat, as she said,

sprang on her shoulder and bit her arm. She also said that she was nowhere near the dog when the cat bit her. There was evidence that a notice had been put up prohibiting the admission of dogs, but the plaintiff denied having seen it. The plaintiff's husband said "The manageress told me 'all cats with kittens are vicious, and naturally go for dogs.'" Miss Simpson, who was called as authoress of the "Book of the Cat," said, "Cats rearing kittens are inclined to be savage and in a vicious state, even if gentle otherwise. If such a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her, that is, if it was in a vicious state, or had been frightened."

The following questions were left to the jury:—(1.) Did the plaintiff take her dog on the premises by the permission of the defendants?—Yes. (2.) Or with acquiescence of the defendants?—Yes. (3.) Had the cat (to the knowledge of the defendants), while rearing kittens, a disposition to attack a dog in her neighbourhood and a person holding a dog?—Yes. (4.) Did the cat attack the dog unprovoked?—Yes. (5.) Were the plaintiff's injuries the result of the cat attacking her dog?—Yes. (6.) Did the defendants take reasonable precautions (under the circumstances) for the safety of their customers?—No. (7.) Damages?—100*l*.

On these findings the county court judge gave judgment for the plaintiff.

The defendants appealed.

Shakespeare, for the appellants. The county court judge ought to have withheld this case from the jury. There was no evidence of negligence fit for their consideration. It cannot be said that a cat, even with kittens, is an animal feræ naturæ, such as a monkey—*May* v. *Burdett* (1)—or an elephant: *Filburn* v. *People's Palace and Aquarium Co.* (2); neither was this cat, although an animal mansuetæ naturæ, known to be vicious towards mankind as was the dog in *Baker* v. *Snell*. (3) The fact that a cat with kittens is likely to attack a dog is not sufficient to make its owner liable if it attacks a human being: *Osborne* v. *Chocqueel*. (4)

(1) (1846) 9 Q. B. 101.
(2) (1890) 25 Q. B. D. 258.
(3) [1908] 2 K. B. 825.
(4) [1896] 2 Q. B. 109.

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Neither are the defendants liable for breach of duty as invitors on the principle laid down in *Indermaur* v. *Dames* (1)—first, because the plaintiff was not an invitee, there being no invitation to persons with dogs to enter the defendants' shops, but was at most a mere licensee, as in *Cooke* v. *Midland Great Western Railway of Ireland* (2) and *Lowery* v. *Walker* (3); secondly, because even if the plaintiff was an invitee the danger, if any, was not one of which the defendants knew or ought to have known. No one could have foreseen such an accident, and if there was any negligence on the part of the defendants the injuries to the plaintiff and her dog were not the natural or probable consequence thereof: *Sharp* v. *Powell* (4); *McDowall* v. *Great Western Ry. Co.* (5)

McCall, K.C., and *Martin O'Connor*, for the respondent. The question is not whether the Court would come to the same conclusion as the jury, but whether there is any evidence to support the verdict. It is not necessary that an animal should be at all times and in all places dangerous to mankind: it is sufficient if it is dangerous in certain circumstances. The owner of a bull known to be dangerous to persons wearing a certain colour is liable for injury done to a person wearing that colour: *Hudson* v. *Roberts.* (6) In *Barnes* v. *Lucille* (7) Darling J. said: "I do not think, further, that in order to make the owner of a dog liable the dog must be always and invariably ferocious. If the owner knows that at certain periods the dog is ferocious, then he has knowledge that at those times the dog is of such a character that he ought to take care of it. If a man knows that a bitch which is ordinarily amiable is ferocious when she has pups, and people go near her, I think he has knowledge that at such times she is of a ferocious character, and in these circumstances he ought to shut her up, and prevent her getting at people while she is ferocious, although the ferocity of the dog's character is intermittent." The evidence before the jury was that a cat with kittens was likely to attack a person who had been carrying a dog.

(1) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(2) [1909] A. C. 229.
(3) [1911] A. C. 10.
(4) (1872) L. R. 7 C. P. 253.
(5) [1903] 2 K. B. 331.
(6) (1851) 6 Ex. 697.
(7) (1907) 96 L. T. 680.

That fact imposes upon the owner of the cat the duty to keep it shut up. It also imposes upon the owner, being a restaurant keeper, some duty towards customers with dogs whom he invites or permits to enter his premises. Was there any evidence of a breach of that duty? The mere fact that the cat was abroad and not shut up was some evidence. Then the question whether there was in fact a breach of that duty was for the jury. The jury found that the cat had (to the knowledge of the appellants), while rearing kittens, a disposition to attack a dog in her neighbourhood and a person holding a dog; and that the appellants did not take reasonable precautions in the circumstances for the safety of their customers. There was evidence to support both findings.

To contend that the appellants were not liable because no one could have contemplated such an accident is to confuse the measure of damages in an action of contract with the extent of liability in an action of tort. When a breach of duty is established, the defendant is liable for the direct consequences of it, and what he or anybody else may have contemplated is beside the mark: *Smith* v. *London and South Western Ry. Co.* (1) [*Jones* v. *Perry* (2) and *Baldwin* v. *Casella* (3) were also cited.]

Shakespeare in reply.

Cur. adv. vult.

May 23. The following written judgments were delivered:—

Ridley J. This was an action commenced in the High Court, but remitted to the county court at Westminster, in which the plaintiff claimed damages for injuries caused to herself and also for injuries caused to her dog from the bite of a cat in one of the defendants' establishments for tea and refreshments. The learned judge stated the facts set out above, and continued:

It may be observed that if the cat was to be classed as an animal *feræ naturæ*, the sixth question left to the jury was not relevant, because according to *Nichols* v. *Marsland* (4) and *Baker* v. *Snell* (5) a person keeping such an animal is liable for the consequences.

(1) (1870) L. R. 6 C. P. 14.
(2) (1796) 2 Esp. 482.
(3) (1872) L. R. 7 Ex. 325.
(4) (1875) L. R. 10 Ex. 255.
(5) [1908] 2 K. B. 352, 825.

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however arising. The case must have been put on two grounds, as it was before us, namely, first, that this cat must be classed as an animal feræ naturæ; and, secondly, that if not, still it constituted a danger against which it was the defendants' duty to take reasonable care to protect their customers, which they had not done. As to the first point, the facts appear to me to shew that the cat was not dangerous to human beings but to dogs, and that nothing would have happened had not the plaintiff taken the dog with her into the room. It would be a strong thing to hold that a cat when vicious with dogs (because she has kittens) ceases to be a domestic animal and becomes feræ naturæ, so that her owner is responsible for all eventualities, as in *Baker* v. *Snell.* (1)

An animal may, indeed, be dangerous from a temporary cause, as was the case in *Barnes* v. *Lucille* (2), but there it was shewn that while with puppies that dog was dangerous to mankind, so that it was for a time feræ naturæ. But this cat was not dangerous to mankind, nor would any mischief have happened but for the presence of the dog brought by Mrs. Clinton. Mr. McCall, however, contended that such a cat must nevertheless be accounted feræ naturæ because it is vicious towards such of mankind as are carrying dogs and must be likened to the bull which attacked a person wearing a red handkerchief: *Hudson* v. *Roberts.* (3) In that case the defendant said after the accident that he knew that the bull (or a bull) would run at anything red, and that was left to the jury as knowledge of the scienter. The Court refused to interfere, saying that there was evidence for the jury, and I am much disposed to agree; for I think that a bull which is vicious to persons wearing a red tie may well attack a person without one. But the hostility of cat and dog, on the other hand, has passed into a proverb, and I am not disposed to say that if a cat attacks a dog, and by accident a person who happens to be there, the cat is therefore dangerous to mankind. I think the cat is not to be classed as dangerous to mankind, but that the bull is. I have looked at *Baldwin* v. *Casella* (4), which was quoted in the argument, and find it is not against this view of the law,

(1) [1908] 2 K. B. 352, 825.
(2) 96 L. T. 680.
(3) 6 Ex. 697.
(4) L. R. 7 Ex. 325.

although it chiefly turns on another point, namely, whether the knowledge of the servant is the knowledge of the owner.

Taking this view of the first point argued, there could have been no liability on the defendants had the occurrence taken place under circumstances placing no liability on them except such as would arise from the mere ownership of the cat. But it was contended, secondly, that they were liable to the plaintiff because of the duty under which they lay as occupiers to take reasonable care to prevent injury to their customers: *Indermaur* v. *Dames*. (1) In that case the Court said with regard to a visitor (2): "We consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." There is not here any suggestion of contributory negligence, and the jury found that the defendants had not taken reasonable precautions. Mr. Shakespeare, on the other hand, contended that the bite inflicted by the cat on the plaintiff was such an unusual danger as the defendants were not called upon to provide against, that their liability in respect of the cat was limited by the duty imposed upon them legally in respect of an animal not in fact dangerous to mankind, and that this case was analogous to *McDowall* v. *Great Western Ry. Co.* (3) There the defendants had left upon a siding a van coupled to a train of trucks and sufficiently secured by brakes, as was found by the jury, unless interfered with. Some boys trespassing and in mischief managed to undo the couplings and loose the brakes, so that the van ran down the line and injured the plaintiff, who was on a highway. Kennedy J. gave judgment for the plaintiff, but the Court of Appeal reversed that decision upon the grounds, first, that there was nothing in the circumstances

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(2) L. R. 1 C. P. at p. 288.

(3) [1902] 1 K. B. 618; [1903] 2 K. B. 331.

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of the case which would induce a person of ordinary care to do more than the railway company did, and, secondly, that the effective cause of the accident was the act of a stranger. And so in *Sharp* v. *Powell* (1), where the facts were these: The defendant's servant had washed a van of his on a part of the street opposite the coachhouse and the water ran along the gutter for some distance till, meeting an obstruction, it formed a pool which was soon frozen over. The plaintiff's horse fell in passing over the ice and received the injury which was the subject of the action. The judge at the trial ruled that the defendant was not liable, and the Court of Common Pleas affirmed the direction. Bovill C.J. said (2): "There is no doubt but that a man who does a wrongful act is liable for the ordinary consequences which are likely to arise from the commission of such an act, but that he is not generally responsible for what are not such ordinary consequences, unless he be shewn to have had knowledge of any fact which made it probable that the consequences, though not ordinary, would result from the act." In the first of these cases the mischievous conduct of the boys, and in the latter the accumulation of the water, was the proximate cause of the accident; and neither was the act of the defendant. But if the Great Western Railway in their case had known that the mischievous boys were likely to set the van loose they might have been liable; and so might Mr. Powell if his servant had been shewn to have knowledge that a sheet of ice would be formed at the corner of the street. In this case the jury found that the cat had a disposition, when rearing kittens, to attack a dog and a person holding a dog. They also found that the plaintiff took the dog there with the defendants' acquiescence, and that the defendants did not take reasonable care for the safety of their customers; and I consider that the defendants' duty was to take reasonable care to provide for the safety of their customers. But how does the rule stated by Bovill C.J. apply to these facts? It is not possible to treat the plaintiff as a stranger such as the boys in the railway case were; but she was there as a cause of the accident; and as an effective cause, for without her and the dog it would

(1) L. R. 7 C. P. 253. (2) 41 L. J. (C.P.) at p. 98.

not have occurred. Giving the best consideration to the matter that I can, I have come to the conclusion that the defendants are not answerable for what happened, because it was not an ordinary consequence of their act, there being no evidence that they had any reason to expect it; in other words, the rule laid down by Bovill C.J. as quoted above applies.

I must not omit to notice the case of *Cooke* v. *Midland Great Western Railway of Ireland* (1), which might be regarded as opposed to this view. In that case the railway company left a gap in their fence near the line giving access to a turntable, and there was evidence that children used the turntable as a plaything with the acquiescence of the company. The plaintiff, a child, in so using the turntable was injured. The House of Lords held that the railway company were liable, and Lord Macnaghten said, in giving his judgment, "Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable?" And because there was such a likelihood the defendants were held liable. But there the playing on the turntable was known to the railway company, and in that very act was the danger; whereas here the danger was found in a combination of circumstances, and I cannot see that there was such a probability as would have been foreseen by a person of ordinary sense and prudence. This view is much assisted by the late case of *Jenkins* v. *Great Western Ry. Co.* (2) in the Court of Appeal. There the plaintiff, a child of two-and-a-half years, had been run over by a train and injured. The child lived in a house adjoining the railway and got on to the line through a fence to play on a pile of sleepers placed inside the fence. Beyond the sleepers was the line of railway. Some of the railway servants knew that she was in the habit of playing on the sleepers, but not that she was in the habit of getting from the sleepers on to the line of rail. The Court of Appeal, affirming the judge at the trial, entered judgment for the defendants, distinguishing the case from *Cooke* v. *Midland*

(1) [1909] A. C. 229. (2) [1912] 1 K. B. 525.

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Great Western Railway of Ireland (1), and pointing out that there the company knew the turntable itself was used by the children, whereas in the case before them they did not know more than this, that the children played upon the sleepers, and they did not know of their playing upon the line.

As to the damages claimed for the injury to the dog, apart from those for the injury to the plaintiff, I agree with the observations of my brother Bray which I have had the opportunity of seeing. For these reasons I am of opinion that judgment should be entered for the defendants.

BRAY J. I agree with the decision at which my brother has arrived, and I think with the reasons he has given, but as I had already written out my judgment I will give my own reasons.

This is an appeal from a judgment entered by the county court judge in favour of the plaintiff for 100*l.* damages. The case was tried with a jury, and the jury answered seven questions put to them, and on those answers the county court judge entered the judgment. The plaintiff claimed damages, first, for personal injuries sustained by herself, and, secondly, for injuries sustained by her dog under the following circumstances. The defendants are restaurant keepers and have a tea shop in Victoria Street. On August 4, 1911, the plaintiff and her husband entered the tea shop and went down to the basement room. The plaintiff, according to her evidence, which I think it must be taken that the jury accepted as true, carried her Pomeranian dog down with her, and when she sat down she put the dog down by the table, keeping hold of the dog's lead. Then a cat came creeping out of the door of a store room and sprang on the dog and bit him. She picked up the dog with the cat on its back and gave it to her husband. They then prepared to go out, when the cat sprang on the plaintiff's shoulder and bit her arm. At this time she said the dog was not near her. It appeared that the cat had got kittens. The manageress was aware of this and that at that time cats were "vicious and naturally went for dogs." There was evidence that there was a notice up that dogs were not admitted, but it must be taken that the plaintiff had

(1) [1909] A. C. 229.

not seen it and had taken her dog without objection into other of the defendants' shops in the country. On this occasion no objection had been made to her bringing the dog, but it did not appear whether the manageress had seen the dog. The waitress had seen it immediately before the incident. A Miss Simpson, stated to be an expert in cats, was called for the plaintiff and said that cats rearing kittens were inclined to be savage and in a vicious state, even if gentle otherwise, and that if such a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her, that is if it was in a vicious state or had been frightened. The questions put to the jury and their answers have been stated by my brother, and I need not repeat them. The plaintiff's counsel relied on two grounds of action—(1.) a breach of duty by the defendants as possessors of a cat known to be vicious; (2.) a breach of duty which they owed to the plaintiff as a customer whom they had invited into their shop. These points will have to be separately considered in relation to the plaintiff's personal injuries and the injuries to her dog.

First, are the defendants responsible to the plaintiff for the personal injuries she sustained on the ground that they kept a vicious or dangerous cat? The jury have found by their first two findings that the plaintiff took her dog to the premises by the permission of the defendants. It must be taken, therefore that the plaintiff was lawfully in the shop with her dog. The law with regard to the keeping of dangerous animals is thus stated by Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co.* (1): "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."

Now it cannot be doubted that a cat is an animal that is dealt with by mankind on the footing that a person may safely keep it

(1) 25 Q. B. D. 258, at p. 261.

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The question therefore is whether this cat having kittened was likely to do mischief, and whether the defendants through their manageress knew that. It is important to recollect that the scienter which it is necessary to shew is that the animal had a ferocious disposition towards mankind: see *Osborne* v. *Chocqueel.* (1) It need not necessarily be so to all mankind, it is sufficient if it be to a class of mankind not uncommon to meet with: see *Hudson* v. *Roberts* (2), where the defendant had a bull which was known to be dangerous to a man wearing a red handkerchief. I think that class would include a person accompanied by a dog. But is a cat with kittens likely to do mischief to such a person according to the experience of mankind? Was there any evidence to prove this? Miss Simpson stated that if a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her. The manageress stated that all cats with kittens are vicious and naturally go for dogs, and Miss Sale said in cross-examination that a cat is then naturally vicious, but Mr. Shakespeare shewed us from his notes that this meant vicious towards dogs. I have grave doubts whether there was any evidence which ought to have been submitted to a jury on this point. Farwell L.J. in *Baker* v. *Snell* (3) says that it is a wrongful act to keep a dangerous animal. Is it a wrongful act to keep a cat with kittens? If so, a good many people are doing wrongful acts every day and the breeding of cats must be stopped. The law recognizes that it is proper and useful to keep cats, and how is that to be done if the cats are not to have kittens? Perhaps the dictum of Farwell L.J. goes too far; but is it to be said that a person who keeps a cat that has kittens does so at his peril? Surely this would be a most mischievous extension of the law relating to the keeping of animals. But then it is necessary for the plaintiff to shew that the defendants knew of the danger. What evidence is there of this knowledge? The admission of the manageress that all cats with kittens are vicious and naturally go for dogs does not go far enough. It is not an admission that they are dangerous to persons who bring dogs into a room or shop. In my opinion there was no sufficient evidence to support the third finding of

(1) [1896] 2 Q. B. 109. (2) 6 Ex. 697.
(3) [1908] 2 K. B. 825.

the jury, and the plaintiff's claim for damages for personal injuries to herself on this head fails.

Then comes the more difficult question whether the defendants were guilty of a breach of the duty which they owed to a customer whom they had invited into their shop or who was lawfully in their shop. Now it is not suggested that there would have been danger to her if she had come in without a dog. First, did they invite her to come in with a dog? The jury were not asked to so find and have not so found. They have found that they permitted her to do so and acquiesced in her doing so. I do not read those findings as saying that the defendants invited the plaintiff to come with a dog. They invited her to come and did not object when she brought her dog. I think there is a clear distinction in the duty owed towards a person invited and a person permitted. This is pointed out by Willes J. in *Lakeman* v. *Dames* (1) and by Buckley L.J. in *Lowery* v. *Walker*. (2) He says, quoting Martin B. in *Bolch* v. *Smith* (3), "Permission involves leave and licence, but it gives no *right*." . . . . "The question," he says (4), "which I have to investigate in this case is whether to persons of that class (meaning the persons who had been permitted to cross a field) the landowner does not owe this duty: that he will not wilfully expose them to something whose evil character he knows, but as to which he omits to caution the persons whom he thus allows to come there. . . . . The proposition of law, as I understand it, is that the donee must not look a gift horse in the mouth: if something is given, it must be enjoyed as it is given, and taken with its risks; but subject to this, that, if the giver knows of some evil character in it at the time, and does not warn the donee, he is responsible, although it was a gift." On that ground he held that the defendant, who knew that the horse he had put in the field was dangerous, was liable. This opinion of Buckley L.J. was affirmed by the House of Lords. In that case Lord Loreburn says (5): "I think in substance it"—i.e., the finding of the county court judge—"amounts to this: that

(1) L. R. 1 C. P. 274.
(2) [1910] 1 K. B. 173, at p. 189.
(3) (1862) 7 H. & N. 736, at p. 745.
(4) [1910] 1 K. B. at p. 190.
(5) [1911] A. C. 10, at p. 12.

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the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal." If this be the right view of the duty towards a permitted person, the plaintiff does not shew any breach of that duty if I am right in holding, as I have done, that the plaintiff has not proved that the defendants knew the evil or dangerous character of the cat. No doubt if there were an invitation the duty would be larger. It would be a duty to take reasonable care to prevent a danger which he might reasonably have anticipated, or, as Willes J. put it in *Indermaur* v. *Dames* (1), "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

Mr. McCall put the duty higher, as a duty to take reasonable care to prevent all dangers to their customers. I think this is putting the duty too high. In *Smith* v. *London and South Western Ry. Co.* (2) Lord Blackburn, then Blackburn J., says: "It can hardly be negligent not to provide against that which no one would anticipate." This rule of law is sometimes put in another way by saying that the damage is too remote. In *Sharp* v. *Powell* (3) Bovill, C.J. says of one who commits a wrongful act, "generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person." And Grove J. says that "natural" means "probable." Now the county court judge does

(1) L. R. 1 C. P. 274, at p. 288. (2) L. R. 6 C. P. 14, at p. 22.
(3) L. R. 7 C. P. 253, at p. 258.

not seem to have put this to the jury, and if there was evidence to support the third finding it was not necessary that he should do so. If the defendants knew or ought to have known that the cat had a disposition to attack a person holding a dog they ought to have anticipated the danger and taken care to avoid it. If I thought that there was evidence of an invitation to the plaintiff to come in with a dog I might have to consider whether the case should go down for a new trial in order that it might be put to the jury whether the defendants could reasonably have anticipated the danger. It does seem to me, however, that this possible danger was so remote that a jury could not on the evidence before them properly find that the defendants could reasonably have anticipated it. It was at least as remote as the danger in *Sharp* v. *Powell*. (1) It would penalize the possessors of useful animals too highly to make them responsible for damages so remote as these. This was really a most improbable accident which might not happen once in a lifetime. We must see how far one would have to go if the plaintiff is entitled to succeed. There are probably hundreds of shops in London and other towns where no objection is made to a customer who brings a dog with him into the shop. Many of these tradesmen keep cats. Are they bound to keep cats with kittens at their peril? The truth is the risk is so remote as to be negligible, and a person who omits to guard against it is not guilty of negligence. In the result, therefore, I have arrived at the conclusion that there was no evidence to support the plaintiff's claim so far as her personal injuries were concerned.

It remains to consider whether there was any evidence to support the claim for damages for injuries to her dog. Now it is certainly the common experience of mankind that cat and dog will fight whether the cat has kittens or not, but it would be ridiculous to hold that for that reason every person who keeps a dog or a cat does so at his peril and is responsible for any damage his cat will do to his neighbour's dog or his dog will do to his neighbour's cat. There is no case to be found in the books shewing such a liability. Then did the defendants invite the dog into their shop? There is no finding to that effect, and it

(1) L. R. 7 C. P. 253.

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cannot be sufficient if they permitted it to come in. In my opinion the plaintiff's case equally fails as regards the damage arising from the injuries to her dog. It is to be observed that the jury did not assess the damages separately, and therefore the verdict cannot stand if either claim fails. In my opinion, however, both claims fail, and the action should be dismissed with costs here and below.

Appeal allowed.

Solicitor for appellants : *F. J. Berryman.*
Solicitor for respondent : *C. F. Appleton.*

W. H. G.

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March 29.

ROYAL MASONIC INSTITUTION FOR BOYS (TRUSTEES OF), APPELLANTS *v.* PARKES, RESPONDENT.

Factory—Laundry—Laundry carried on incidentally to the Purposes of a Public Institution—"Public Institution"—Factory and Workshop Act, 1907 (7 *Edw.* 7, *c.* 39), *s.* 1.

The Royal Masonic Institution for Boys was a school for boys. One of the buildings was used as a laundry for washing the clothes of the inmates, the machinery being driven by mechanical power; and six resident servants were employed to work therein.

This institution was almost entirely maintained by the subscriptions of Freemasons. No appeal for funds was made to the general public, but voluntary subscriptions were received from members of the general public which amounted only to about one-quarter per cent. of the total subscriptions. The accounts were not published publicly, but only in a book for the use of subscribers. The election of boys to the institution was confined to sons of subscribing Freemasons; the election was by the vote of subscribers according to the amount of their subscriptions. All subscribers of certain amounts were life governors and were members of the general council, which had absolute power to grant or refuse the application of any candidate for election. The management was in the board of management, consisting of thirty Freemasons who were life governors. In the year 1910 the institution received a grant of 654*l.* from the Board of Education as a secondary school. The grounds and premises were strictly private, and no one was admitted without permission of the secretary:—

Held, that the institution was a "public institution" within the

meaning of s. 1 of the Factory and Workshop Act, 1907, which applies the provisions of the Factory and Workshop Act, 1901, to laundries "carried on incidentally to the purposes of any public institution."

CASE stated by justices of Hertfordshire.

The respondent, a factory inspector, preferred an information against the appellants for having at a certain factory, namely, a laundry carried on incidentally to the purposes of their public institution, failed to affix at the entrance the prescribed abstract of the Factory and Workshop Acts, 1901 and 1907, contrary to the provisions of those Acts.

The appellants were the occupiers of certain buildings and premises used as a school for boys, and one of the buildings was set apart for use as a laundry. The appellants had not affixed the abstract prescribed by s. 128 of the Factory and Workshop Act, 1901, in the laundry.

The machinery in the laundry was driven by mechanical power. Six resident servants, but none of the inmates of the institution, were employed in the laundry, which was used exclusively for the washing of the linen of the inmates.

The institution was almost entirely maintained by the subscriptions of Freemasons belonging to the English Constitution of Freemasons. No appeal was made to the general public by advertisement or otherwise, though the appellants were ready to accept and did receive voluntary contributions from members of the general public. The contributions from persons other than Freemasons and their wives or widows were about one-quarter per cent. of the total subscriptions. Subscriptions had been obtained by collections made in churches, but only at Freemasons' services and from Freemasons. The accounts were not published publicly, but only in a book for the use of subscribers. That book was not in any way offered for sale, but the secretary had sold a few copies, not more than eight in any year, to persons applying to him therefor after he had made inquiries as to their bona fides. The election of boys to the institution was confined to the sons of subscribing Freemasons under the English Constitution of any religious denomination; the election was by the vote of subscribers, the number of votes depending on the amount of subscriptions. All subscribers of certain amounts were life

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governors and members of the general council. The general council had absolute power to refuse or to grant the application of any candidate for election. The management of the institution was in the board of management, consisting of thirty Freemasons who were life governors. In 1910 the institution received a grant of 654*l.* from the Board of Education as a secondary school, division A. The grounds and premises of the institution were strictly private, and no one was admitted without the permission of the secretary.

The respondent contended that in these circumstances the institution was a "public institution" within the meaning of s. 1 of the Factory and Workshop Act, 1907 (1), and that the laundry was carried on incidentally to the purposes of that public institution.

The appellants contended that the institution was not a public institution within the meaning of the Act.

The justices held that the laundry was used incidentally to the purposes of the institution, and that they were bound by the case of *Seal* v. *Trustees of British Orphan Asylum* (2) to hold that the institution was a "public institution" within the meaning of the Act, and they imposed a fine of 5*s.*

The question for the opinion of the Court was whether the justices upon the above facts came to a correct decision in point of law.

Danckwerts, K.C., and *Schwabe*, for the appellants. This is a private institution and not a "public institution" within the meaning of s. 1 of the Factory and Workshop Act, 1907. The facts shew that this is in no sense a public institution. The amount of subscriptions received from persons other than Free-

(1) 7 Edw. 7, c. 39, s. 1: "The Factory and Workshop Act, 1901 (which Act, as amended by any subsequent enactment, including this Act, is herein-after referred to as the principal Act), shall, subject to the provisions of this Act, apply to laundries as if at the end of Part II. of the Sixth Schedule to that Act, enumerating non-textile factories and workshops, the following paragraph were added:—

"(29.) Laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business or incidentally to the purposes of any public institution."

(2) (1911) 104 L. T. 424.

masons is only a fraction of the total amount; and the benefits are confined to the sons of Freemasons. In *Seal* v. *Trustees of British Orphan Asylum* (1) the Court did not give any definition of a public institution or lay down any general principle; that case was decided entirely upon its own special facts, which were very different from those in the present case. [They referred to *Reg.* v. *Inhabitants of Stapleton.* (2)]

Beckett, for the respondent. The scope and object of this enactment were to bring laundries of a certain class within the provisions of the Act of 1901, so that the persons working in them might have the protection provided by that Act; certain classes of laundries are specified, one of which is laundries belonging to public institutions, in which probably there are always a considerable number of workers. The expression "public institution" is not a precise or technical expression and must be construed according to its popular meaning. The scope and operation of this institution are sufficiently wide and large to make it a public institution for the purposes of this Act. In *Hall* v. *Derby Sanitary Authority* (3) it was held that an orphanage for children of railway servants was a "public" charity; and A. L. Smith J. said that the distinction was between "public" and "private" and that what was not private was public. The decision in *Seal* v. *Trustees of British Orphan Asylum* (1) really governs and concludes this case. [He referred to *Blois* v. *London Corporation.* (4)]

Danckwerts, K.C., in reply. The justices were clearly wrong in saying that they were bound by the case of *Seal* v. *Trustees of British Orphan Asylum* (1) to hold that this was a public institution. The decision in that case could not bind them as a matter of law to decide that this institution was public.

DARLING J. I think that the decision of the justices was right. The question which we have to decide is whether this school, which is established and chiefly maintained by Freemasons for the benefit entirely of those who belong to their own

(1) 104 L. T. 424.
(2) (1863) 4 B. & S. 629, 639.
(3) (1885) 16 Q. B. D. 163.
(4) (1886) 18 Q. B. D. 437; (1887) 19 Q. B. D. 79.

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body, is a "public institution" within the meaning of s. 1 of the Factory and Workshop Act, 1907. That section applies the provisions of the Factory and Workshop Act, 1901, to "laundries carried on incidentally to the purposes of any public institution," and the question in this case is whether the laundry of this school is carried on incidentally to the purposes of a "public institution."

This school is an institution. In *Seal* v. *Trustees of British Orphan Asylum* (1) the question whether the orphanage was an "institution" was considered, but in this case we need not trouble about that question, for this school calls itself an "institution for boys." The only question, then, is whether this is a "public" institution. In *Hall* v. *Derby Sanitary Authority* (2) A. L. Smith J. lays it down simply that if a thing is not "private" then it is "public," recalling inevitably the definition of prose which we owe to Le Bourgeois Gentilhomme.

Whether or not the Legislature intended to differentiate exactly between private and public institutions and to say that what is not private is public, I think that this is the kind of institution which they contemplated when they provided safeguards for persons employed in laundries. In this laundry six persons are employed for wages to wash for the inmates of the institution.

Looking at this legislation and seeing that laundries of different classes are brought within the Factory Acts, I consider what was the intention of the Legislature in bringing laundries within those Acts and what reasons induced them to do so. The reason must, I think, have been that it was thought necessary to give some protection to women employed in washing in laundries. They did not include every woman so employed, probably because that would have been oppressive and unpopular, but they saw that there were some places where washing was carried on upon a large scale not by way of trade or for gain, but precisely as if it were for that purpose so far as concerned the persons employed. A place of that kind is not an absolutely private undertaking like the laundry of a private

(1) 104 L. T. 424. (2) 16 Q. B. D. 163.

house, however large; it is a different thing; it is not part of a private dwelling, but of an institution.

I do not know whether the word "public" is here mere surplusage; apparently the Legislature thought that there could be such a thing as a private institution. However that may be, is there anything public about this institution? I think that there is. To be a Freemason does not appear to me to be an entirely private matter; it is a very large body from which subscriptions are collected even if nothing is taken from people who are not Freemasons. I cannot think that, so far as this is an appeal to Freemasons, it is anything but a public appeal to a limited class. It is not made merely by separate letters sent to each person; and, though the appellants do not solicit contributions from persons in the streets, still if any one who gets to know of their institution sends a subscription they accept it. Absolutely private persons dealing with their own private affairs do not receive contributions unless they are asking for alms.

Here the appellants solicit contributions from a very large body of people, that is, all Freemasons, and are also open to receive contributions, though they do not solicit them, from anybody who will offer them; and when that is habitually done I cannot come to any other conclusion than that this is the kind of institution which the Legislature intended to bring within the Factory Acts, and that the word "public" is as good a word to indicate the kind of institution at which they were aiming as any word which I can think of.

In my opinion, therefore, this is a public institution, and this laundry which is carried on incidentally to its purposes comes within the provisions of the Factory Acts.

PICKFORD J. I agree.

BANKES J. I agree. It is quite true that in none of the authorities is any definition of what is a public institution attempted to be given; but, having regard to the decision in *Seal* v. *Trustees of British Orphan Asylum* (1), I feel that there are no circumstances here which enable me to distinguish

(1) 104 L. T. 424.

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ROYAL MASONIC INSTITUTION FOR BOYS (TRUSTEES) v. PARKES.

Bankes J.

this case without departing from the principles which have guided other judges. I also attach importance to a particular fact in this case, namely, that this institution is deriving a not inconsiderable sum from public moneys in the form of a grant from the Board of Education; the amount received for 1910 was 654*l*. I think that this is a matter which assists me in coming to a decision, and that I ought not to attempt to distinguish this case from other cases which have come before the Courts.

Appeal dismissed.

Solicitor for appellants: *Stanley J. Attenborough.*
Solicitor for respondent: *Solicitor to the Treasury.*

J. H. W.

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May 15, 16.

JOHNSTON *v.* LALONDE BROTHERS & PARHAM.

Factory—"Manufacturing Process" carried on in Premises—Carpet Beating—Non-Textile Factory—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1 (*b*); *Sixth Schedule, Part II., clause* 28.

By s. 149, sub-s. 1 (*b*), of the Factory and Workshop Act, 1901, the expression "non-textile factory" means "any premises . . . . named in Part Two of the" Sixth Schedule to the Act "wherein . . . . mechanical power is used in aid of the manufacturing process carried on there."

Clause 28 of Part II. of the Sixth Schedule to the Act names (inter alia) carpet beating works:—

Held, that premises in which carpets are beaten by the aid of mechanical power are a factory within the meaning of the Act inasmuch as carpet beating is a "manufacturing process" within the definition contained in s. 149, sub-s. 1 (*b*), read together with clause 28 of Part II. of the Sixth Schedule.

Owner v. *Cottingham Sanitary Steam Laundry Co.* (1910) 102 L. T. 571, and *Royal Masonic Institution for Boys (Trustees of)* v. *Parkes* (1912), ante, p. 212, followed.

CASE stated by justices for the petty sessional sub-division of Weston-super-Mare in the county of Somerset.

An information was laid by the appellant Johnston, one of His Majesty's inspectors of factories, against the respondents, Messrs.

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LANSLEY v. LALONDE BROTHERS & PARHAM.

Lalonde Brothers & Parham, for that they on October 20, 1911, were occupiers of a certain factory within the meaning of the Factory and Workshop Act, 1901, at 85, Alfred Street, in the parish of Weston-super-Mare, in the county of Somerset, and that on the said date all the inside walls of the rooms in the factory and all the ceilings or tops of those rooms were not limewashed, the said walls, ceilings, or tops of rooms not having been painted with oil or varnished, contrary to the said Act. (1)

The facts proved or admitted before the justices (so far as material to this report) were as follows:—

On the date of the alleged offence none of the inside walls or

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1, sub-s. 3: "For the purpose of securing the observance of the requirements in this section as to cleanliness in factories, all the inside walls of the rooms of a factory, and all the ceilings or tops of those rooms (whether those walls, ceilings or tops are plastered or not), and all the passages and staircases of a factory, if they have not been painted with oil or varnished once at least within seven years, shall (subject to any special exceptions made in pursuance of this section) be limewashed once at least within every fourteen months, to date from the time when they were last limewashed; . . . ."

Sect. 149, sub-s. 1: "Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:—

"The expression 'non-textile factory' means—

. . . . . .

"(*b*) any premises or places named in Part Two of the said" (i.e., the sixth) "schedule wherein . . . . mechanical power is used in aid of the manufacturing process carried on there;

. . . . . .

"The expression 'workshop' means—

"(*a*) any premises or places named in Part Two of the Sixth Schedule to this Act which are not a factory;

. . . . . ."

"SIXTH SCHEDULE.

"List of Factories and Workshops.

. . . . . .

"Part II.

"Non-Textile Factories and Workshops.

"(26.) 'Quarries,' that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites or other minerals;

"(27.) 'Pit-banks,' that is to say, any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts.

"(28.) Dry cleaning, carpet beating and bottle washing works."

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ceilings of the rooms of the respondents' premises the subject-matter of the information (the same not having been painted with oil or varnished within seven years previous to the date of the alleged offence) had been limewashed within fourteen months then last past.

The respondents carried on in a part of the premises the business of carpet beaters, carpets being there beaten by means of a machine driven by a gas engine within the premises.

On behalf of the appellant it was contended that the premises in question were a factory within the meaning of the Factory and Workshop Act, 1901, on the ground (inter alia) that carpet beating is specifically mentioned in Part II. of the Sixth Schedule of the Act, and that therefore the carrying on of the process of carpet beating by the aid of mechanical power within the premises constituted the premises a factory.

On behalf of the respondents it was contended that the offence alleged was an offence confined by s. 1 of the Factory and Workshop Act, 1901, to factories as defined by that Act, and did not affect workshops as defined by the Act, which were by s. 2 of the Act subject to different regulations and procedure, and that Part II. of the Sixth Schedule of the Act contained a list of premises which were either non-textile factories or workshops; that whether any particular premises mentioned in Part II. of the Sixth Schedule were a factory or a workshop depended, under s. 149 of the Act, on the question whether any manufacturing process was carried on there; that carpet beating was not a manufacturing process; and that that portion of respondents' premises was therefore, under the Act, a workshop and not a factory.

The justices were of opinion that the carpet beating was not a manufacturing process and that the premises were, under the provision of the Act, a workshop and not a factory.

The question for the opinion of the Court was whether the determination was correct in point of law.

S. A. T. Rowlatt, for the appellant. These premises were a "non-textile factory" within the meaning of s. 149, sub-s. 1 (*b*), of the Factory and Workshop Act, 1901, inasmuch as mechanical

power was used "in aid of the manufacturing process carried on there," and "carpet beating works" are expressly mentioned in Part II., clause 28, of Sched. VI. The Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), by s. 1 applies the provisions of the Act of 1901 to laundries as if they were enumerated at the end of Part II. of Sched. VI. of the earlier Act; and under that enactment it has been decided that the work done in a laundry is a "manufacturing process" within the meaning of s. 149 of the Act of 1901: *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1) It follows from that decision that the work of carpet beating may equally be a "manufacturing process." The decision in *Law* v. *Graham* (2) was upon the provisions of s. 93 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), which were different from the provisions of this Act.

T. W. P. Inskip, for the respondents. Part II. of the Sixth Schedule to the Factory and Workshop Act, 1901, comprises both "factories" and "workshops," and these premises may be a "workshop," but they cannot reasonably be said to be a "factory." To be a factory within the meaning of s. 149, sub-s. 1 (*b*), a "manufacturing process" must be carried on upon the premises, and carpet beating is not in any sense a manufacturing process. In *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1) the laundry company were not represented and the point was not raised that the laundry might be a workshop but not a factory. In *Law* v. *Graham* (2) it was not suggested in the judgment that bottle washing was a manufacturing process. Full effect can be given to the provisions of s. 149 and Part II. of Sched. VI. of the Act of 1901 without saying that carpet beating is a manufacturing process; for the premises can be a workshop.

There are items in Part II. of the Sixth Schedule of the Factory and Workshop Act, 1901, which give full effect to the definition of a factory in s. 149, sub-s. 1 (*b*), of the Act, and it is therefore not necessary to strain the language by including in the definition premises in which no "manufacturing process" in the natural and ordinary sense is carried on.

(1) 102 L. T. 571. (2) [1901] 2 K. B. 327.

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LORD ALVERSTONE C.J. The very able argument which has been addressed to us by Mr. Inskip on behalf of the respondents is similar to those which have been presented to the Court on more than one occasion. The material sections in the Factory and Workshop Act, 1901, reproduce, in a manner which makes close consideration necessary, sections which were in previous statutes, and one cannot avoid seeing that words are used in them in a somewhat unnatural sense. The difficulty in upholding Mr. Inskip's argument on behalf of the respondents is that if he is right in saying that these premises are included as workshops under the definition of the expression "workshop" in s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, which says that the expression "workshop" means "(*a*) any premises or places named in Part Two of the Sixth Schedule to this Act which are not a factory," it follows that there never could be a factory in either of the three cases mentioned in clause 28 of Part II. of the Sixth Schedule. It would be impossible to accept Mr. Inskip's contention without overriding the construction the Court has placed upon the words of s. 149 of the Factory and Workshop Act, 1901, in previous cases. It would be ridiculous to suggest that the meaning of the definition of the expression "non-textile factory" in s. 149, sub-s. 1 (*b*), of the Act of 1901 is that there must be an independent manufacturing process carried on in the bottle cleaning, carpet beating, or dry cleaning premises or places which are mentioned in clause 28 of Part II. of the Sixth Schedule to the Act. The same line of argument as has been addressed to us with regard to clause 28 of Part II. of the Sixth Schedule would equally apply to other clauses, e.g., to clauses 26 and 27, because in my opinion in ordinary parlance one would not say that in a quarry (which is mentioned in clause 26) a manufacturing process is carried on unless the word "manufacturing" is used with a secondary meaning. Coprolites are dug out of the ground, shaken in a sieve, and sold. As to slate, there may be a manufacture. A "pit-bank" (mentioned in clause 27) has a secondary meaning as to a manufacturing process, and all that can be said is that the workers at the top, by sorting out the dirt, &c., are making the coal fit for sale. As to dry cleaning, carpet beating, and bottle washing works it is

impossible to suggest that in ordinary circumstances they are manufacturing processes, but, notwithstanding the assistance I have had from Mr. Inskip, I am of opinion that what was meant by the definition of non-textile factory in s. 149, sub-s. 1 (*b*), of the Factory and Workshop Act, 1901, was that in all cases mentioned under clauses 21 to 28 of Part II. of the Sixth Schedule, if in aid of the manufacturing process carried on in the premises (meaning any of the processes there enumerated) steam, water, or mechanical power is used, the premises shall be a factory and not a workshop.

In *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1) the Court had to consider the same line of argument in reference to the addition to the Sixth Schedule to the Factory and Workshop Act, 1901, of the word "laundries," and to apply the same words of s. 149, sub-s. 1 (*b*), "steam, water or other mechanical power is used in aid of the manufacturing process carried on there." The Court came to the conclusion that the places named in Part II. of the Sixth Schedule to the Act in which mechanical power was used in aid of the process there carried on (for the purpose of definition described as a manufacturing process by the conjoint operation of s. 149, sub-s. 1 (*b*), and the schedules) were factories. We cannot now come to any other conclusion without rejecting the reasoning upon which the decisions in *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1) and *Royal Masonic Institution for Boys (Trustees of)* v. *Parkes* (2) were based. This appeal must therefore be allowed, and the case remitted to the justices with a direction to convict.

Pickford J. concurred.

Avory J. I am of the same opinion. I consider myself bound by the decision of this Court in *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1) Although it is true that no counsel appeared for the respondent in that case, it was not one that was decided without argument: the case was fully presented by the appellant, and the Court gave judgment and thoroughly appreciated the point which has again

(1) 102 L. T. 571. (2) Ante, p. 212.

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been raised in the present case. I therefore think it is a decision which binds me. But apart from that decision I should have come to the same conclusion, because I cannot read the definitions of a "non-textile factory" and of a "workshop" in s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, in the way in which Mr. Inskip invites us to read them. The definition of a "workshop," which Mr. Inskip invites us to say was meant to apply to dry cleaning, carpet beating, and bottle washing works, does not say that premises in which those things are carried on are to be deemed a workshop, but says that any of the premises named in Part II. of the Sixth Schedule to the Act are to be deemed a workshop which are not a factory. It seems to me that it would have been so simple to say that certain of the places named in Part II. shall be a factory and certain others shall be a workshop; instead of which the Legislature has said that all those places named in Part II. shall be a factory if steam or other mechanical power is used in aid of the manufacturing process carried on there. "Workshop" is defined to be any of those places which are not a factory, which means in which steam or other mechanical power is not used in aid of the manufacturing process. It is impossible to give effect to the words "manufacturing process" if they do not apply to such processes as carpet beating or bottle washing when you find works in which those processes are carried on are specifically included under the head of "factory" and not under the head of "workshop" if there is steam, water, or other mechanical power used. In these circumstances I think the appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for respondents: *Gray & Co., Weston-super-Mare.*

J. E. A.

HACKNEY FURNISHING COMPANY *v.* WATTS.

1912
April 30;
May 9.

Distress—Exemption—Goods comprised in Hire-Purchase Agreement—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

The plaintiffs let furniture to the tenant of a flat under a hire-purchase agreement which by clause 6 provided that "In case any of the said rent" (i.e., of the furniture) "shall be in arrear . . . . or if the said articles shall be seized or taken under colour or in pursuance of any legal process, the owners shall thereupon, without formal demand, be entitled to resume possession of the said articles . . . ."

The hirer became in arrear with his monthly payments due under the agreement to the plaintiffs, and their solicitors wrote to him giving him notice determining the agreement, and requiring of him an immediate appointment for the plaintiffs to send their men to remove the goods.

The defendant, as agent for the landlord of the flat, subsequently distrained upon the goods for arrears of rent due from the hirer. The plaintiffs thereupon served a declaration on the defendant under s. 1 of the Law of Distress Amendment Act, 1908, that the hirer had no right of property or beneficial interest in the goods, but the defendant refused to deliver them to the plaintiffs unless the arrears of rent of the flat were paid. The plaintiffs paid the amount of the arrears of rent under protest and brought an action in the county court to recover it back as money received by the defendant to their use, and claimed in the alternative a like sum as damages for illegal distress on their goods—

Held, that the amount was not recoverable inasmuch as the hire-purchase agreement was still in existence notwithstanding the notice contained in the letter from the plaintiffs' solicitors to the hirer. The goods when distrained on were therefore comprised in a hire-purchase agreement within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and the distress was lawful.

London Furnishing Co. v. *Solomon* (1912) 28 Times L. R. 265, overruled.

Appeal from a judgment of the deputy judge of the Brentford County Court.

The action was brought in the county court to recover the sum of 13*l.* 2*s.* as money had and received by the defendant to the use of the plaintiffs. The particulars of claim alleged that the "said sum of 13*l.* 2*s.* was paid by the plaintiffs to the defendant under protest on the 7th November 1911, in respect of rent and expenses alleged to be due under a distress wrongfully and illegally

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levied by the defendant on the plaintiff's goods at 8, Arlington Park Mansions, Turnham Green, in the county of Middlesex. Alternatively, the plaintiffs claim the like sum as damages for illegal distress on their goods."

The facts were as follows:

On September 27, 1909, the plaintiffs by a hire-purchase agreement of that date let the goods to one Duval. By the agreement the plaintiffs agreed to let and Duval agreed to hire the goods subject to the terms and conditions (so far as material) following:—

"The hirer agrees:

"1. To pay 3*l.* on signing the agreement in consideration of the option of purchase herein granted for which credit will only be given in the event of the hirer electing to purchase the said articles and

"2. To punctually pay the owners without previous demand the monthly rent of three pounds for the hire of the said articles, commencing this date, the first of such monthly payments to be made on the 27th day of October next, and so on month by month so long as the hirer sees fit to continue the hiring.

. . . . .

"5. To keep the said articles free and exempt from legal process.

"6. In case any of the said rent shall be in arrear, or in case the hirer commit any breach of this agreement, or suffer any such breach to be committed, or if the said articles shall be seized or taken under colour or in pursuance of any legal process, the owners shall thereupon, without formal demand, be entitled to resume possession of the said articles (without prejudice to the owners' right to recover rent and damages for breach of this agreement up to the date of such retaking), and for that purpose full power and liberty are given hereby to the owners, their servants, agents, assigns and their agents, to enter into any house or premises and retake the said articles.

. . . . .

"6 C. To regularly and punctually pay the rent, rates and taxes of the house, building or apartments in which the said articles of furniture and effects shall lawfully be for the time being, and to

produce or forward by post to the company, their agents or servants, the receipt for such payment of rent whenever required by them or any of them so to do, and to keep the said articles of furniture and effects free and exempt from all legal process.

. . . . . .

"The owners agree that:

. . . . . .

"B. The hirer may at any time during the hire become the purchaser of the said articles by paying the sum of 86*l.* 10*s.* and in that event credit will be given for all previous payments.

"C. The hirer may become the purchaser of the said articles by punctually paying the rent as aforesaid, but the hirer shall be, and remain, merely a bailee unless and until the full sum of 86*l.* 10*s.* has been paid at the times and in manner aforesaid.

"D. Should the owners retake the said articles by virtue of the terms of this agreement, the hirer shall have the right either (1.) to buy the said articles within twenty-eight days provided the hirer pay a sum which together with the previous payments equals the sum of 86*l.* 10*s.* and in addition pay the expenses of and incidental to such repossession, such payments to be made within twenty-eight days after such repossession as aforesaid, or (2.) to resume the hiring provided the hirer pay arrears of hire up to the date of repossession and present a guarantor to the satisfaction of the owners, and pay the expenses of, and incidental to, the retaking and removal of the said articles within twenty-eight days after such repossession."

On October 4, 1911, Duval being in arrear in payment of some instalments, the plaintiffs' then solicitors wrote to him a letter which (so far as material) was as follows:

"Our clients instruct us to give you notice determining the agreement, and to require of you an immediate appointment when they can send their men to remove the goods. Failing this, our instructions are to take such proceedings against you in the matter as may be necessary to enforce our clients' rights under the agreement."

A few days afterwards Duval telephoned to the plaintiffs proposing terms which they refused. No physical attempt was made by the plaintiffs to take repossession of the goods, but on

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October 16, 1911, they issued a writ in the High Court against Duval for damages for the detention of the goods. Duval appeared to the writ and said he should fight. On November 6, 1911, the defendant, as agent for the landlord of the flat at 8, Arlington Park Mansions, Turnham Green, of which Duval was tenant and in which the goods were, distrained upon them for 13*l.* 2*s.* for arrears of rent due from Duval in respect of the flat and expenses incurred in making the distress. Duval informed the plaintiffs' solicitors of the distress and said that he should not contest the action they had commenced against him any further. The plaintiffs then served upon the defendant a declaration under s. 1 of the Law of Distress Amendment Act, 1908, which (so far as material) was as follows: "The immediate tenant of the premises at 8, Arlington Park Mansions, Turnham Green, in the county of London, has no right of property or beneficial interest in the furniture, goods or chattels set forth in the inventory annexed hereto and distrained or threatened to be distrained upon. And such furniture, goods or chattels are the property of the above named company, and are not goods or live stock to which the said Act is expressed to apply.

"The above named company" (the plaintiffs) "are not lodgers at or under-tenants of the said premises."

Then followed the inventory of the goods.

The defendant claimed to hold the goods as being comprised in the hire-purchase agreement and therefore not being privileged from distress under the Law of Distress Amendment Act, 1908, by reason of the provision contained in s. 4 of the Act. The plaintiffs paid the defendant the sum of 13*l.* 2*s.* under protest in order to obtain possession of the goods and commenced the action in the county court for the recovery of that amount.

The deputy county court judge gave judgment for the defendant. He held that the present case was not governed by the decision in *London Furnishing Co.* v. *Solomon* (1) upon the ground that in that case the hire-purchase agreement did not contain a clause similar to clause D of the hire-purchase agreement of September 27, 1909. In giving judgment the deputy

(1) 28 Times L. R. 265.

county court judge said: "Under clause D he, the hirer, has a right, for twenty-eight days afterwards, to retake possession of the property on paying 26*l.* or, taking into account the amount already paid, the balance left: so, until that date occurs, the hire-purchase agreement is in existence." He therefore held that the goods were at the date of the distress comprised in the hire-purchase agreement within the meaning of s. 4 of the Law of Distress Amendment Act, 1908 (1), and were lawfully distrained by the defendant.

The plaintiffs appealed.

W. de B. Herbert and *Schwabe*, for the plaintiffs. As the plaintiffs took all legal steps to determine the hire-purchase

(1) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1: "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—

. . . . . .

"(*c*) any . . . . person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to such superior landlord by his immediate tenant, such . . . . person . . . . may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such . . . . person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained . . . . upon, and that such furniture, goods, or chattels are the property . . . . of such . . . . person aforesaid, and are not goods . . . . to which this Act is expressed not to apply; . . . . and to such declaration shall be annexed a correct inventory, subscribed by the . . . person aforesaid, of the furniture, goods, and chattels referred to in the declaration; . . . ."

Sect. 2: "If any superior landlord, or any bailiff or other agent employed by him, shall, after being served with the before-mentioned declaration and inventory . . . . levy or proceed with a distress on the furniture, goods, or chattels of the . . . . person aforesaid, such superior landlord, bailiff, or other agent shall be deemed guilty of an illegal distress . . . ."

Sect. 4: "This Act shall not apply—

"(1.) to goods . . . . comprised in any . . . . hire purchase agreement . . . . nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof . . . ."

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agreement, the goods were no longer comprised in it within the meaning of s. 4 of the Law of Distress Amendment Act, 1908: *London Furnishing Co.* v. *Solomon.* (1) Therefore the defendant had no right to distrain upon the goods, as s. 4 of the Act of 1908 does not apply, and under s. 1 of that statute the landlord was prevented from lawfully distraining upon them. The decision in *London Furnishing Co.* v. *Solomon* (1) shews that in s. 4 of the Act of 1908 the word "comprised" means comprised in a valid and subsisting hire-purchase agreement. When the plaintiffs terminated their consent to the goods remaining in the possession of the tenant Duval they ceased to be in his reputed ownership. That consent was terminated by the plaintiffs' solicitors' letter to Duval of October 4. The plaintiffs had in law an implied right to determine the agreement without any express clause to that effect being contained in it. Under the hire-purchase agreement the hirer had only a right to possession of the goods so long as he performed his agreement. When he broke his contract the plaintiffs could retake the goods at once without any express clause to that effect. The bailment was determined by the plaintiffs' notice of October 4. The conduct of Duval amounted to a repudiation of the agreement and the plaintiffs accepted the repudiation.

[They also contended that the deputy county court judge was wrong in holding that the effect of clause D in the hire-purchase agreement was to keep the agreement in existence notwithstanding the notice determining it contained in the plaintiffs' solicitors' letter to Duval of October 4, 1911, but the Court expressed no opinion upon that point.]

Ennis and *Lazarus*, for the defendant. There is no provision in the hire-purchase agreement giving power to determine the agreement by notice. The word "comprised" in s. 4 of the Law of Distress Amendment Act, 1908, does not mean that the goods must be held under the hire-purchase agreement. The section means that the goods are included in the agreement and gives the clue by which the goods may be identified as being exempted from clause 1 of the Act of 1908. The decision in *London Furnishing Co.* v. *Solomon* (1) was wrong. The hire-purchase agreement was

(1) 28 Times L. R. 265.

still alive after the notice contained in the letter of October 4. Even if it were terminated the goods would be still "comprised" in it within the meaning of s. 4 of the Act of 1908. The position taken up by Duval was that he had a right to retain possession of the goods. There was no repudiation by him of the hire-purchase agreement. The decision of the deputy county court judge as to the effect of clause D of the hire-purchase agreement was right.

Schwabe in reply. After the plaintiffs' solicitors' notice of determination of the agreement contained in their letter of October 4 the goods were no longer comprised within an existing valid hire-purchase agreement. The agreement had ceased to exist, and the goods were therefore no longer comprised in a hire-purchase agreement: *Raffety* v. *Schofield* (1); *Nicholson* v. *Smith*. (2)

May 9. The following judgment of the Court (Phillimore and Bray JJ.) was read by

Bray J. This action was brought by the Hackney Furnishing Company against Mr. Watts, the agent of the landlord of a flat, No. 8, Arlington Park Mansions, Turnham Green, for wrongfully distraining on some goods on those premises which the plaintiffs claimed belonged to them. The deputy county court judge decided in favour of the defendant, and the plaintiffs appeal from that decision.

The facts are as follows: On September 27, 1909, by a hire-purchase agreement of that date the plaintiffs let the goods to one Duval. The agreement entitled the owners to resume possession of the goods if Duval made default in payment of any of the instalments and in certain other events. On October 4, 1911, Duval being in arrear in payment of some instalments, the plaintiffs' solicitors wrote to him a letter of that date. That letter purported to terminate the hiring agreement, a power which the owners had not got, but I think it is fair to read it as purporting to determine the bailment and claiming to have repossession of the goods. A few days after (the evidence does not show how many) Duval telephoned to the

(1) [1897] 1 Ch. 937. (2) (1882) 22 Ch. D. 640.

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plaintiffs proposing terms which the plaintiffs refused. On October 16 the plaintiffs issued a writ against Duval for detention of the goods and damages. Duval appeared to the writ and at an interview with the plaintiffs' solicitors said he should fight.

On November 6 the defendant, as agent for the landlord, distrained on the goods which still remained on the premises. Duval informed the plaintiffs' solicitors of the distress and said he should not contest the action further. The plaintiffs then served the defendant with a declaration under s. 1 of 8 Edw. 7, c. 53. The defendant claimed to hold the goods under s. 4, which provides that the Act shall not apply to goods comprised in any hire-purchase agreement.

Now these goods, at any rate, had been comprised in a hire-purchase agreement and had come into the possession of the tenant under that agreement. Why are they not comprised in a hire-purchase agreement within the meaning of the section? Is there any reason for not adopting the natural meaning of the words?

It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. The words must not be strained so as to further restrict his rights. The reason for s. 4 would seem to be this. The owners have voluntarily and for their own gain placed the goods where they could be distrained; the so placing them tends to induce the landlord to give credit to the tenant, and the tenant presumably under such an agreement has a substantial interest in the goods which ought to be available to the landlord. If a demand of possession by the owners is sufficient to make the goods no longer comprised in the hire-purchase agreement, there is no reason for the provision that the statute shall not apply to goods in a hire-purchase agreement. Until demand of possession goods comprised in a hire-purchase agreement are in the order and disposition of the tenant and come within the later words. It is said that after demand of possession the goods are to be deemed no longer comprised in the hire-purchase agreement, but the agreement is not dead. The owners cannot recover their goods without shewing their title to do so under the agreement. They

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have voluntarily parted with the possession, they have to show a right to retake possession.

These considerations lead us to consider the decision of the Divisional Court in *London Furnishing Co.* v. *Solomon*. (1) In that case the landlord was not represented, and the Court had not the advantage of hearing arguments in support of the view we are now suggesting. Under these circumstances we do not think we are bound by that decision. The Court there held that after demand of possession the goods were no longer comprised in a hire-purchase agreement within the meaning of s. 4. For the reasons we have given we do not think that was right. On behalf of the plaintiffs Mr. Schwabe further argued that the conduct of Duval amounted to a repudiation of the hire-purchase agreement and that that agreement was at an end. We do not think the facts support that contention. Duval's acts were consistent with an allegation on his part that he had not made default and was entitled to retain possession under the agreement. To prove a repudiation by one party entitling the other to rescind clear evidence is required. If this point was raised at the trial the county court judge must have found there was no repudiation, because he finds that the agreement was still in existence.

The county court judge based his judgment in favour of the defendant partly on clause D in the hire-purchase agreement, which entitled Duval in case the owners retook possession to either buy the goods or resume the hiring within twenty-eight days after repossession on his fulfilling certain conditions. We do not think it necessary to decide whether the existence of this right alone would entitle the landlord to distrain. It may be that the true view of the clause is that it does not enlarge the estate or interest of the hirer, but only gives him a right to contract, and that if the goods are not for other reasons to be deemed to be comprised under the hire-purchase agreement the clause will not keep them under it.

It is sufficient to decide, as we do, that in the circumstances of this case the hire-purchase agreement was still in existence, and the goods when distrained on were comprised in a hire-purchase

(1) 28 Times L. R. 265.

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agreement within the meaning of s. 4. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiffs: *H. E. Tudor.*

Solicitor for defendant: *R. R. G. Norman.*

J. E. A.

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July 16.

In re JONES BROTHERS. *Ex parte* ASSOCIATED NEWSPAPERS, LIMITED AND OTHERS.

Bankruptcy—Petition—Suspension of Payment—Proposed Deed of Assignment—Assent of Creditor—Revocation of Assent before Execution of Deed—Estoppel—Joint Petition.

A creditor, who has assented to a proposed deed of assignment by a debtor for the benefit of his creditors, may revoke his assent before the deed is executed. A creditor so revoking his assent is not precluded from relying on any act or acts leading to or connected with the proposed assignment as an act or acts of bankruptcy on which to found a petition.

In re Hawley, Ex parte Ridyway (1897) 4 Mans. 41, and *In re Woodroff, Ex parte Woodroff* (1897) 4 Mans. 46, distinguished.

Where a joint petition in respect of several debts is presented by two creditors of whom one is and the other is not estopped from relying on the act of bankruptcy on which the petition is founded, a receiving order may be made if the debt due to the creditor who is not estopped is sufficient.

APPEAL from the county court of Gloucestershire holden at Bristol.

In March, 1912, Nathaniel Arundell Jones, who was carrying on business as Jones Brothers, advertising agents in Bristol, consulted his solicitor, Mr. W. H. Brown, with reference to his affairs. As the result of investigations made a notice was sent out to N. A. Jones's creditors in the following terms:—

"49, Corn Street, Bristol,

"12th March, 1912.

"Dear Sirs,—We have been consulted by Messrs. Jones Brothers of Queen's Road, Clifton, Bristol, advertising agents,

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IN RE GEORGE NEWNES, LIMITED; ASSOCIATED NEWSPAPERS, LIMITED *Ex parte.*

with reference to their affairs, and shall be glad if you will attend a meeting of creditors to be held at our offices as above, on Monday next, the 18th inst., at 3 o'clock in the afternoon. Meanwhile please let us have a statement of your account.

"Yours truly,

"W. H. Brown & Son."

Between March 12 and March 18 a statement of affairs was prepared by one F. G. Tricks, a member of the firm of Charles A. Tricks & Son, accountants, of 18, Nicholas Street, Bristol.

The meeting took place on March 18 and was attended by a large number of creditors and representatives of creditors, among whom was a Mr. W. T. Pearce, representing the appellants George Newnes, Limited. Just before the meeting the appellants the Associated Newspapers, Limited, telephoned to the solicitors stating the amount of their debt, regretting that they were unable to be present at the meeting, and requesting that they might be informed of what passed. A statement of affairs was produced at the meeting, and it was resolved that N. A. Jones should be requested to execute an immediate deed of assignment for the benefit of his creditors to Mr. Frederick George Tricks, of 18, Nicholas Street, Bristol, accountant, as trustee, and that a committee of inspection should be appointed, including one W. T. Pearce, who purported to be representing the appellants George Newnes, Limited. This resolution was signed by W. T. Pearce.

On March 20 F. G. Tricks sent to the creditors a circular letter enclosing a statement of affairs submitted to the meeting, a copy of the resolution, and a form of assent to be signed. Among the creditors to whom these documents were sent were the Associated Newspapers, Limited.

On March 23 the Associated Newspapers, Limited, wrote to F. G. Tricks, returning the form of assent duly completed. On the same day a meeting of the committee of inspection was held, at which W. T. Pearce was present, and at which it was resolved that F. G. Tricks should write to the principal creditors who had not assented and that the deed should be executed as soon as the principal creditors had assented.

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JONES BROTHERS, *In re.*

ASSOCIATED NEWSPAPERS, LIMITED, *Ex parte.*

On April 2 F. G. Tricks received from Associated Newspapers, Limited, a letter in the following terms:—

"April 1, 1912.

"Dear Sirs,—In re Jones Brothers of Bristol.—With reference to your letter of March 20 last, certain facts have now been brought to my notice in relation to the debtors' affairs which, had they been known to us before, would have precluded this company from assenting to the proposed deed of assignment. I beg therefore to give you notice that I hereby revoke the assent enclosed with my letter of March 25 and I shall be obliged if you will return the document to me in due course.

"Yours faithfully,

"J. E. B. Duff,

"Manager Legal Department."

The matters alluded to were that W. H. Jones had lately been a partner with N. A. Jones, and these creditors were of opinion that the position of W. H. Jones ought to be investigated.

On April 2 Charles A. Tricks & Son wrote to the Associated Newspapers, Limited:—

"Gentlemen,—In re Jones Brothers.—We are in receipt of yours of the 1st inst. requesting the return of your form of assent to the proposed deed of assignment and beg to enclose the same herewith. We have heard that some creditors are dissatisfied and propose putting the matter into bankruptcy. We therefore refuse to take the deed to our Mr. F. Tricks while this is contemplated. While we are anxious to do the best we can for the creditors it is most annoying to the committee of inspection and ourselves and also detrimental to the interests of the general body of creditors in holding up the matter as they are doing. Either they must file a petition or assent to the deed. The landlord to-day has distrained for rent and there is now a threat to cut the gas off. We could have avoided all this had the deed been executed but we decline to accept it without the assent of all the principal creditors. If the deed was executed the committee would be prepared to have other creditors in their number if desired. If you are in communication with other

creditors, may we ask you in the interests of the whole to come to a decision without further delay.

"Believe us,

"Yours faithfully,

"Chas. A. Tricks & Son."

On April 19, 1912, a petition was presented. The petitioning creditors were George Newnes, Limited, and the Associated Newspapers, Limited. They stated that Jones Brothers were justly and truly indebted to them in the aggregate in the sum of 320*l.* 18*s.* 7*d.*, being justly and truly indebted to George Newnes, Limited, in the sum of 39*l.* 12*s.* and to the Associated Newspapers, Limited, in the sum of 281*l.* 6*s.* 7*d.* The acts of bankruptcy on which the petition was founded were (1.) that on March 12, 1912, the debtors gave notice to their creditors that they had suspended or were about to suspend payment of their debts; (2.) that on March 18 they gave a similar notice to their creditors at a meeting of their creditors held on that date; (3.) that on April 2, 1912, they gave a similar notice to their creditors in a letter caused to be written by the debtors from Messrs. Charles A. Tricks & Son and addressed to the Associated Newspapers, Limited.

The petition came on for hearing in the county court of Gloucestershire holden at Bristol before the registrar of the Court, who adjourned the matter for hearing before the judge. The acts of bankruptcy or some or one of them having been admitted, the county court judge held that the Associated Newspapers, Limited, by assenting to the proposed deed had precluded themselves from relying on the acts of bankruptcy or any of them, and that they could not withdraw their assent when it was once given inasmuch as their assent might have formed the consideration for which some other creditor or creditors gave their assent. He therefore dismissed the petition.

The petitioning creditors appealed.

O. Keeling, for the appellants. There is nothing here to preclude the appellants from relying on the acts of bankruptcy as the basis of a petition. The principle on which a creditor is precluded is that being an assenting party to a deed he cannot be

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heard to say that the deed is a fraud on creditors: *Bamford* v. *Baron* (1); *Back* v. *Gooch* (2); *Ex parte Stray, In re Stray* (3); *In re Hawley, Ex parte Ridgway* (4); *In re Woodroff, Ex parte Woodroff* (5); *In re Mills, Ex parte Mills.* (6) In all those cases a deed had been executed. In the present case, even if there had been an executed deed assented to by the appellants they might have revoked their assent on learning for the first time the fact that W. H. Jones had lately been a partner: *In re Tanenberg & Sons, Ex parte Perrier.* (7) But there was no deed executed, and therefore there is no pretence for saying that other creditors have been induced to assent to a deed by the conduct of the appellants. Any one of the assenting creditors might have revoked his assent before execution of the deed. The onus of proving assent lies on the party alleging it: *In re Michael, Ex parte Michael.* (8)

Hansell, for the respondent. There may be assent to a deed of assignment before as well as after execution of the deed: *In re Michael, Ex parte Michael.* (8) The mischief of allowing an assenting creditor to treat the deed and its preliminaries as acts of bankruptcy is just the same whether assent is given before or after execution of the deed. The parties assenting after execution do so on the faith of assent given by others. They do not disregard assent given before execution.

Secondly, George Newnes, Limited, never revoked their assent. It is clear they cannot rely on the alleged acts of bankruptcy. Neither therefore can their co-petitioners, the Associated Newspapers, Limited. The title of the joint petitioners is affected by the flaw in the title of one of them.

PHILLIMORE J. This appeal must be allowed. The bankrupt was a member of a firm of Jones Brothers. Several creditors of the firm were pressing for payment, and N. A. Jones, the partnership having been dissolved by the retirement of W. H. Jones, his partner, called a meeting of the creditors. At the meeting a resolution was passed that the debtor should execute an immediate

(1) (1788) 2 T. R. 594, note (*a*).
(2) (1815) 4 Camp. 232.
(3) (1867) L. R. 2 Ch. 374.
(4) 4 Mans. 41.
(5) 4 Mans. 46.
(6) [1906] 1 K. B. 389.
(7) (1889) 6 Mor. 49.
(8) (1891) 8 Mor. 305.

deed of assignment for the benefit of the creditors and that Mr. F. G. Tricks, a member of the firm of Charles A. Tricks & Son, accountants, of Bristol, should be the assignee. A committee of inspection was appointed, and one of the committee, Mr. W. T. Pearce, was the representative of George Newnes, Limited, one of the petitioners. A form of assent to a deed if and when made was circulated among the creditors and was signed by the Associated Newspapers, Limited, and apparently also by George Newnes, Limited, or their representative. The Associated Newspapers, Limited, soon afterwards discovered a fact which made them regret their assent, and which if they had known it in time would have led them to withhold their assent. They wrote to the proposed assignee and purported to revoke their assent. The proposed assignee, whether he had or had not authority to accept this revocation, accepted it in fact, and returned the form of assent to the Associated Newspapers, Limited, at their request. This petition was then filed. Three acts of bankruptcy were relied on, but execution of a deed of assignment is not one of them. The three acts of bankruptcy relied on were the circular notifying the debtor's intention to call a meeting of creditors, the statement, proposal, and resolution made and passed at that meeting, and the letter of the accountants of April 2. There seems to be some doubt as to whether at the hearing before the county court judge all these alleged acts of bankruptcy were admitted. In my view it is not necessary to decide whether such an admission was made, or whether the letter of April 2 did or did not constitute an act of bankruptcy. There was also a point taken by the appellants which I do not think it is necessary to decide, namely, whether the assent was obtained on a misstatement of fact such that it could be recalled on the authority of *In re Tavenberg & Sons, Ex parte Perrier*. (1) This case is to be decided without reference to any of these points.

In my view circulars and statements leading up to or connected with the execution of a deed of assignment cannot be relied upon as independent acts of bankruptcy by persons who have assented to the deed itself and are consequently estopped from relying on

(1) 6 Mor. 49.

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JONES BROTHERS, *In re.* ASSOCIATED NEWSPAPERS, LIMITED. *Ex parte.*

Phillimore J.

the deed itself as an act of bankruptcy. The law on this point is established by the cases of *In re Hawley, Ex parte Ridgway* (1), and *In re Woodroff, Ex parte Woodroff.* (2) These were both cases in which the party alleged to have acquiesced in the deed of assignment had been dealing subsequently with the assignee as a lawfully constituted authority, and it may be quite right and proper to say that as such a person cannot base a petition in bankruptcy upon the act constituting the assignee, so neither can he rely upon any acts, such as statements or circulars, leading up to that act. However it is not really necessary to discuss those cases because in them there was a deed executed and existing. In the present case there was no deed. It is indeed suggested that by the time the petition came on for hearing there was some deed executed, but as to who were the parties or what were the terms we know nothing. Probably such a deed would be no answer at all assuming it was executed. A creditor who gives his assent beforehand to the proposal that there should be a deed may recall his assent before actual execution, and if the deed is subsequently executed he is not to be taken to have assented to the deed. There is a locus pœnitentiæ up to the moment when the deed is executed. The assent given a priori can be revoked up to that moment, and neither the debtor nor the other creditors can complain. There is nothing to prevent them from revoking their assent and relying on any available act of bankruptcy, including such as may be connected with the proposed assignment.

Then as to the contention that, George Newnes, Limited, having assented to and being estopped from relying on the deed, their co-petitioners the Associated Newspapers, Limited, cannot succeed, I think that the infirmity, assuming there is an infirmity, in the title of George Newnes, Limited, does not in this case affect the position of the Associated Newspapers, Limited. If in order to make a good petitioning creditor's debt it had been necessary to add together the debts due to these two creditors it might have been another matter. In the present case the debt of the Associated Newspapers, Limited, was amply sufficient to ground a petition.

(1) 4 Mans. 41. (2) 4 Mans. 46.

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JONES BROTHERS, *ex parte* ASSOCIATED NEWSPAPERS, LIMITED, *in re* JONES.

This appeal must therefore be allowed, and a receiving order must be made.

LORD COLERIDGE J. I am of the same opinion. If a creditor recognizes a deed of assignment he recognizes all the preliminaries necessary thereto so as to be estopped from relying upon any one of them as an act of bankruptcy. If a creditor assents to a deed his assent may be given before or after the deed is executed. Here no deed was executed at the date of the filing of the petition. If there was one after that we know nothing of its terms. In any event the only assent ever given by the Associated Newspapers, Limited, was an assent to the execution of a deed to be executed immediately. Any assent to such a deed is revocable up to the time of execution, and even after that if it were not executed immediately.

Appeal allowed.

Solicitors for appellants: *Slark, Edwards & Cobban.*
Solicitors for respondent: *W. H. Brown & Son, Bristol.*

W. H. G.

C. A.
1912
June 21.

[IN THE COURT OF APPEAL.]

In re A DEBTOR (No. 837 OF 1912).

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Judgment or Order—"Whereon execution has not been stayed"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

In an action against the debtor for specific performance of a contract to purchase real estate an order was made on February 17, 1911, that upon the plaintiffs executing a conveyance, to be settled by the judge in case the parties differed, the defendant should pay to the plaintiffs at such time and place to be agreed upon or fixed by the judge, but not before July 6, 1911, the sum of 2400*l.*, representing the agreed amount of principal and interest payable under the contract on March 1, 1911, and it was ordered that the plaintiffs' costs should be taxed and paid by the defendant, and that all further proceedings in the action be stayed except for the purpose of carrying the order into effect.

On January 12, 1912, the Master certified that the conveyance had been settled and executed, and fixed February 12, 1912, as the date for the payment of the 2400*l.*

On March 23, 1912, the plaintiffs issued and served upon the debtor a bankruptcy notice to pay the sum of 2400*l.* "due on a final judgment or order" dated February 17, 1911, "whereon execution has not been stayed":—

Held, (1.) that the judgment was a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, upon which the bankruptcy notice could be founded; (2.) that the notice was accurate in stating that execution upon the judgment had not been stayed; (3.) that the judgment was not incorrectly described in the notice as a "judgment or order"; and that consequently the notice was valid.

Ex parte Moore (1885) 14 Q. B. D. 627, and *In re Poole* (1890) 7 Morrell, 222, followed.

THIS was an appeal from an order of the registrar in bankruptcy.

In 1910 an action was commenced against the debtor for specific performance of a contract into which he had entered to purchase certain real estate from the Nast Hyde Estate (Hatfield) Company, Limited.

On February 17, 1911, by consent, an order was made in chambers in the action that, upon the plaintiffs executing a conveyance of the property to the defendant (as an escrow to be delivered to the defendant on payment of the sum of 2400*l.* as

thereinafter mentioned), such conveyance to be settled by the judge in case the parties differed, the defendant do pay to the plaintiffs at such time and place to be agreed between the parties or to be fixed by the judge in case the parties differed, but not before July 6, 1911, the sum of 2400*l.*, representing the agreed amount of principal and interest due and payable on March 1, 1911, pursuant to the terms of the contract, and it was ordered that the plaintiffs' costs should be taxed and paid by the defendant, and that all further proceedings in the action be stayed except for the purpose of carrying the order into effect. On January 12, 1912, the Master certified that a proper conveyance had been settled and executed by the plaintiffs in accordance with the order, and fixed February 12, 1912, at the Royal Courts of Justice, as the time and place at which the defendant was to pay the sum of 2400*l.* in the said order mentioned to the plaintiffs.

On March 23, 1912, the plaintiffs issued and served upon the debtor a bankruptcy notice to pay the sum of 2400*l.* "claimed by them as being the amount due on a final judgment or order" dated February 17, 1911, "whereon execution has not been stayed."

On April 4, 1912, the debtor moved to set aside the bankruptcy notice on the ground that the judgment was not a "final judgment."

The registrar took the view that the notice was inaccurate because it stated "whereon execution has not been stayed," whereas it should have stated "whereon execution has been but is not now stayed," and he set aside the notice.

The creditors appealed.

Hansell, for the appellants. There is no ground for contending that as between vendor and purchaser the order obtained by the plaintiffs is not a "final judgment." It is none the less a final judgment because certain matters have to be adjusted in order to carry it into effect: *Ex parte Moore* (1); *In re Poole* (2); *In re Alexander*. (3)

(1) 14 Q. B. D. 627. (2) 7 Morrell, 222.
(3) [1892] 1 Q. B. 216.

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A DEBTOR, *In re.*

The registrar has held the bankruptcy notice bad because of the statement "whereon execution has not been stayed," holding that execution had been stayed. But there was never in fact any stay of execution.

Tindale Davis, for the respondent. The view of the registrar was correct. There was a stay of execution until the certificate was made. The notice should have been in the form "whereon execution has been but is not now stayed." Execution could not have issued on the order, and the bankruptcy notice is so framed as to be incorrect: *Ex parte Ide.* (1)

[FARWELL L.J. *Ex parte Ide* (1) was quite different. At the date of the bankruptcy notice the creditor in that case was not in a position to issue execution. Here he was.]

Under the judgment the amount was not to be paid until July 6, 1911, so that execution could not have issued on February 17, the date of the judgment.

Having regard to the General Rules under the Bankruptcy Act, r. 136 and Form 6 of the Appendix thereto, the bankruptcy notice is bad in form. The addition of the words "or order" invalidates the notice.

This is not a "final judgment," and a bankruptcy notice could not properly be founded on it: *In re Crump* (2); *Ex parte Chinery* (3); *Ex parte Schmitz, In re Cohen.* (4)

COZENS-HARDY M.R. This is an appeal from the order of the registrar, and it raises the question whether the bankruptcy notice which has been served is or is not one on which subsequent proceedings can be founded.

The bankrupt entered into a contract to purchase some property from the Nast Hyde Estate (Hatfield) Company, Limited. An action was commenced in the Chancery Division for specific performance of that contract, and by consent of the parties the matter was dealt with by Swinfen Eady J. in chambers. The following order was accordingly made in chambers: [His Lordship stated the terms of the order, and continued:] That was an order, in the common form, under which the conveyance

(1) (1886) 17 Q. B. D. 755.
(2) (1891) 8 Morrell, 174.
(3) (1884) 12 Q. B. D. 342.
(4) (1884) 12 Q. B. D. 509.

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Cozens-Hardy M.R.

had to be settled by the judge in chambers, that is to say the Master, and a date had to be fixed by which the purchase-money was to be paid, but the judge directed the Master not to fix a date before July 6, 1911. The Master made his certificate, and it is quite in the usual form: "A proper conveyance to the defendant of a further twelve acres of the estate referred to in the said order being the portion described in the second part of the schedule to such order has been settled consisting of an indenture intended to be made between the plaintiffs of the one part and the defendant of the other part. The said indenture is identified by my signature in the margin of the engrossment thereof. The said indenture has been executed by the plaintiffs as an escrow in accordance with the said order. Monday the 12th day of February, 1912, between the hours of 12 at noon and 1 of the clock in the afternoon and Room No. 138 at the Royal Courts of Justice, London, are named as the time and place at which the defendant is to pay the sum of 2400*l.* in the said order mentioned to the plaintiffs." The effect of that order was that the 2400*l.* was not due on February 17, 1911. In that circumstance Mr. Tindale Davis is quite right, but it was due on February 12, 1912, under the judgment and pursuant to the tenor of it. The bankruptcy notice is in this form: "Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to the Nast Hyde Estate (Hatfield) Company, Limited, of No. 6, Poultry, in the city of London, the sum of 2400*l.* claimed by them as being the amount due on a final judgment or order obtained by them against you in the Chancery Division of this Honourable Court, dated the 17th day of February, 1911, whereon execution has not been stayed." Now three points have been made. First it is said that this is not a final judgment. If this is not a final judgment I cannot conceive anything that is. There was nothing more to be done in this matter. It was a final adjudication of the rights of the parties, the result of which was that on a day thereafter named, and subject to conditions which had to be fulfilled, and which in fact have been fulfilled, the sum of 2400*l.* became payable. I feel no doubt that this is a final judgment within the meaning of the rule, and if authority were wanted I

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think *In re Poole* (1), to which our attention has been called, is a case which certainly ought to be followed. The present case is much easier than that, because here we are only dealing with the rights between the plaintiffs and defendant in the action, whereas *In re Poole* (1) was a curious case in which the rights in question were those of the defendants inter se. Therefore I feel no doubt that this is a final judgment.

But then it is said, and this was the view which the learned registrar acted upon, that the notice was inaccurate because it said "whereon execution has not been stayed." My difficulty would be if words to the contrary effect had been inserted. I have looked through this judgment and I cannot find anything like a stay of execution. No doubt it is quite true that it is necessary for the person who serves a bankruptcy notice to say that at the date when the notice is served the sum of money is then due under the judgment; that is the critical date; that critical date is past here, and the mere fact that the judgment is for a sum to be settled and paid by a subsequent date to be ascertained by the Court is no ground for holding that this is a case in which there has ever been a stay of execution. The right to issue execution never arose until February 12, 1912, the date fixed by the Master.

Then it is said that this notice is bad because it states that the amount is due on a "final judgment or order." The judgment is final; it is a complete adjudication between the parties; it is binding, and no further question can arise; it is a final adjudication between the parties to a proper litis contestatio; and I think it would be insisting upon a technicality beyond endurance if we were to hold this bankruptcy notice, which in all respects is perfectly right, to be invalid by reason of this document of February 17, 1911, being described therein as a "final judgment or order." Whether it is technically called a judgment or an order seems to me to be really of no moment at all. The real essence of the case is, Is it or is it not "a final adjudication of the rights of the parties," to use the language of Lord Selborne in *Ex parte Moore?* (2)

In my opinion, with great respect to the registrar, the view he

(1) 7 Morrell, 222. (2) 14 Q. B. D. 627.

has taken is wrong, and the appeal must be allowed, with the usual consequences.

Farwell L.J. I am of the same opinion. With all respect to the learned registrar I do not agree with his judgment.

In my view, a creditor must be in a position to issue execution as at the date upon which he issues the bankruptcy notice. To quote the words of Bowen L.J. in *Ex parte Ide* (1), "In order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice." In the case of *Ex parte Ide* (2) the creditor was not in that position; in the present case he was in that position, and therefore he was entitled to issue the notice.

I do not agree with the learned registrar with regard to the right way to describe this judgment, nor do I agree with him when he says that execution has been but is not now stayed. In my view there cannot be any stay of execution until the right to issue execution has arisen; one cannot stay that which does not exist. A stay of execution is a technical phrase well understood.

Then it is said that this is not a final judgment. With regard to that I will read a sentence from the judgment of Lord Selborne in *Ex parte Mason* (3): "To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties."

That also disposes of the last point of Mr. Tindale Davis that the description "judgment or order" vitiates the whole notice. If Lord Selborne used the phrase "constitute an order a final judgment" I think the draftsman may be pardoned for having called this a "judgment or order."

Kennedy L.J. I am of the same opinion.

It seems to me, with great respect to the registrar, that he was wrong as to the point upon which he decided the case. This judgment was not to become effective so as to confer upon the plaintiffs a right to demand, and to impose upon the debtor a duty to pay, a sum of money, or, in other words, it was not a

(1) 17 Q. B. D. at p. 759. (2) 17 Q. B. D. 755.
(3) 14 Q. B. D. 627.

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A DEBTOR, *In re.*

Kennedy L.J.

udgment which by its terms and tenor would create a debt until a subsequent date, and, if that is so, it is not a case to which a stay or the word "stay" relates at all. It only became operative as creating the debt, and the right to receive and the duty on the part of the debtor to pay the debt, at a date later than that of the judgment but before the date of the application to make the debtor a bankrupt; it was a judgment which operated according to its tenor without any stay at all, because the debt, as I say, did not arise until the conveyance was ready, when from that moment there was a duty on the part of the debtor to pay a certain sum of money. I am therefore at a loss to see how there can be said to have been any stay at all. If there had been an application to the Court on the date at which this money had to be paid and the judgment conformed to—if there had been a stay at that moment—it would have been necessary, if that stay had once existed and been taken off, to state the fact in the bankruptcy notice. But that is not the case here. I agree with the other members of the Court that as a general proposition of law it is not correct, with regard to a judgment of this kind, to say that the creditor must be in a position to issue execution as at the date of the judgment where the judgment by its tenor only creates the relationship of creditor and debtor at a subsequent date.

With regard to the other point, whether in fact this was a "final judgment" upon which the bankruptcy proceedings could be founded, I also entirely agree with the other members of the Court. It seems to me that if there ever was a final order or judgment this is one, and, further, to hold the notice invalid because it says "final judgment or order" would be to give effect to a pure formality.

In my opinion this appeal ought to succeed.

Appeal allowed.

Solicitors: *B. F. Browne; Surtees, Phillpotts & Co.*

G. A. S.

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May 16.

Bastardy—Non-service of Summons—Subsequent Marriage of Mother—Application by Married Woman for Amendment of Date of Hearing in Summons—Power of Justices to make Affiliation Order—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3, 4.

In April, 1911, a summons under the Bastardy Laws Amendment Act, 1872, against the putative father of an illegitimate child was issued upon an application made by the mother of the child, the mother then being a single woman. The summons could not be served owing to the absence of the putative father. In September, 1911, the mother married, and in January, 1912, the putative father of the child having returned, the mother applied to the clerk to the justices to amend the date of hearing in the summons. The summons was accordingly altered and served upon the putative father, and at the hearing, which took place in February, 1912, the justices adjudged him to be the father of the child and ordered him to contribute to its maintenance:—

Held, that the summons so altered by the clerk to the justices was equivalent to a second summons, and as the mother was a married woman at the date she applied for the alteration to be made, the case fell within the decision in *Tozer* v. *Lake* (1879) 4 C. P. D. 322, and the justices had no power to make the order.

Per Avory J. (following the decision in *Ex parte Fielding* (1861) 25 J. P. 759): The application by the mother must be deemed to have been made in January, 1912, when the altered summons was issued, and as she was not then a single woman, no order could be made upon the application.

Case stated by justices for the county of Warwick.

An information and application under the Bastardy Laws Amendment Act, 1872 (1), were preferred on April 26, 1911, by

(1) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3: "Any single woman who . . . . may be delivered of a bastard child after the passing of this Act may . . . . at any time within twelve months from the birth of such child . . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child . . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

Sect. 4: "After birth of such bastard child, on the appearance of the person so summoned, or on

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the respondent Mabel Wright in her then name of Mabel Phillips (she being then unmarried) against the appellant, alleging that he was the father of a bastard child of which she had been delivered on November 19, 1910.

A summons was thereupon issued against the appellant which was returnable on May 16, 1911. The summons could not be served by reason of his having left the neighbourhood. The appellant returned to the neighbourhood in or about the month of January, 1912, whereupon the respondent gave information of this and applied to the clerk to the justices that the date of hearing in the summons should be amended and the summons served. The summons was altered and served, and in pursuance thereof the case came on for hearing before the justices sitting as a petty sessional court on February 20, 1912.

Upon the hearing of the information and application the justices came to the conclusion upon the evidence adduced before them that the appellant was the father of the child and that he had left his residence for the purpose of avoiding being served with the summons, and they made an order against him accordingly to contribute to its maintenance.

At the hearing it was admitted that the respondent had married on September 2, 1911, one Wright, and that she was living with and supported by her husband at the date of the hearing, and it was contended by the appellant's solicitor that by reason of the marriage the respondent was not entitled to an order. The justices, however, decided that inasmuch as she was not married at the date of her application, namely, on April 26,

proof that the summons was duly served on such person, or left at his place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . . of a sum of money weekly, not exceeding five shillings a week, for the maintenance and education of the child . . . ."

1911, the day when her information was laid, her subsequent marriage before the date of adjudication by the justices was not a bar to her obtaining an order.

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The question for the opinion of the Court was whether the justices came to a right conclusion in law in deciding that the respondent's marriage was not a bar to the making of the order.

J. F. Eales, for the appellant. For the purposes of the present case it is admitted that the question whether the amendment of the summons was a proper proceeding is not raised, and therefore no objection to the amendment on the ground that it was irregular is taken on behalf of the appellant. But assuming that the alteration in the summons was regular, no order could be made upon the altered summons. Under ss. 3 and 4 of the Bastardy Laws Amendment Act, 1872, the application for a summons must be made by the woman while she is single. The word "single" in s. 3 of the Act of 1872 fixes the status of the woman throughout the whole of the proceedings. Before the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), no one except parish guardians was entitled to an order against the putative father. The application by the guardians was made in order to prevent the child being maintained out of the rates. By a proviso contained in s. 5 of the Act of 1844 an order made under that Act ceased to have any effect if the mother married. Form 8 in the schedule to the Bastardy Act, 1845 (8 & 9 Vict. c. 10), contains the words "until the said" mother "shall marry." An order made under that statute therefore ceased to operate when the mother married. In the Bastardy Laws Amendment Act, 1872, the proviso contained in s. 5 of the Poor Law Amendment Act, 1844, was omitted, and the result is that under the Act of 1872, if a single woman obtains an order, her subsequent marriage does not invalidate it. But she must be single at the time the order is made: *Stacey* v. *Luttrell* (1); *Thorn* v. *Lake*. (2) The present case is governed by the decision in *Thorn* v. *Lake*. (2) The amendment which was made in the date of the hearing of the summons was equivalent to the issue of a fresh summons.

(1) (1878) 4 Q. B. D. 291. (2) 4 C. P. D. 322.

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and the summons originally issued was abortive as in *Tozer* v. *Lake*. (1)

The only effective summons was applied for by the respondent after she was married. The application by the respondent in January, 1912, to the clerk to the justices that the date of hearing in the summons should be amended was a fresh application for a summons, and as the respondent was then married no order could be made: *Hardy* v. *Atherton* (2); *Peatfield* v. *Childs*. (3) The decision in *Sotheron* v. *Scott* (4) has no bearing upon the point now before the Court. [Saunders on Affiliation, 10th ed. p. 7, *Jones* v. *Davies* (5), *Potts* v. *Cambridge* (6), and *Staples* v. *Staples* (7) were also referred to.]

Maddocks, for the respondent. The clerk to the justices in altering the date of hearing in the summons was performing a mere ministerial act which relates back to the original application. The issue of the summons is merely the procedure of the Court which follows the application under s. 3 of the Bastardy Laws Amendment Act, 1872: *Staples* v. *Staples*. (7) *Tozer* v. *Lake* (1) is distinguishable. In that case a second summons was issued, and not merely an amendment made in the original one. If the amendment had been made by a justice, he would not have had to exercise any judicial discretion: *Ex parte Fielding*. (8) There is nothing in the Act of 1872 which requires the woman to be single at the date of the hearing of the summons, unless the words "such woman" in s. 4 import a single woman who may be with child and who may under s. 3 apply for a summons. But s. 4 cannot refer to a woman who is with child because the hearing is only to take place after the birth of the child. The respondent complied with all the requirements of s. 4 of the Act of 1872: *Plymouth Guardians* v. *Gibbs*. (9) *Jones* v. *Davies* (5) is in the respondent's favour. [*Reg.* v. *Chugg* (10) was also referred to.]

J. F. Eales in reply. *Plymouth Guardians* v. *Gibbs* (9) was

(1) 4 C. P. D. 322.
(2) (1881) 7 Q. B. D. 264.
(3) (1899) 63 J. P. 117.
(4) (1881) 6 Q. B. D. 518.
(5) [1901] 1 K. B. 118.
(6) (1858) 8 E. & B. 847.
(7) (1879) 41 L. T. 347.
(8) 25 J. P. 759.
(9) [1903] 1 K. B. 177.
(10) (1870) 11 Cox, 558.

a decision upon the Bastardy Laws Amendment Act, 1873 (36 & 37 Vict. c. 9), the language of which is entirely different from that of the Act of 1872.

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LORD ALVERSTONE C.J. This case raises points of some difficulty and the authorities do not lay down a clear line of distinction so as to enable us to say that the present case falls upon one side or the other. If we had to deal with the simple question whether the respondent's marriage operated as a bar to the order, the application being made by her and the summons having been issued whilst she was a single woman, I think we should have to answer that particular question in favour of the respondent. If an application is made by a single woman the authorities shew that an order may be made even though the woman marries after the issue of the summons. That is clear from the decisions in *Sotheron* v. *Scott* (1) and other cases. If therefore the only question were whether an order could be made if the woman married before the date of the order, the answer would be in favour of the respondent.

But in the present case the facts are that, as the summons which was issued upon the application of the respondent when she was a single woman could not be served, she, after she was married, applied to the clerk to the justices that the date of hearing in the summons should be amended. That was done, and the summons having been served on the appellant the hearing took place at which the justices made the order. It seems to me that upon these facts it is clear upon the face of the case stated by the justices that the proceedings which were taken were not effective at the time when the respondent was a single woman. In January, 1912, as it had not been possible to serve the summons, it was altered by amending the date of hearing stated in the summons. It seems to me that we must treat the statement in the case as to the alteration and service of the summons as meaning that the date named in the summons for the hearing was altered in order to adapt the summons to the fact that the appellant could not be served before January, 1912. We therefore ought to say that in our

(1) 6 Q. B. D. 518.

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judgment the effective summons on which the order of February 20 was made was the summons as altered on the application of the respondent in January, 1912, and which called upon the appellant to appear before the justices on February 20, 1912.

If that is so the respondent was married before the summons was, in law, issued, and the decision in *Tozer* v. *Lake* (1) is an authority directly in favour of the appellant. In that case it was held that a bastardy order cannot be made where the mother has married since the birth of the child and is at the time of the application for the summons living with her husband, although she took out a summons against the putative father before her marriage and was prevented from serving it by his default. In giving judgment Denman J. said "*Stacey* v. *Lintell* (2) is a distinct authority to shew that s. 3 of 35 & 36 Vict. c. 65 does not apply where the application for the summons is made by a married woman"; and Lindley J. said "There never was an order upon a summons issued by this woman when she was single." In order to appreciate the decision in *Tozer* v. *Lake* (1) it is necessary to bear in mind the material dates in that case. The original application of the woman for a summons was made on July 6, 1876, she then being single. A summons was duly issued but could not be served. On March 11, 1879, upon the application of the woman, who was then married, a second summons was issued by virtue of the application made by the woman on July 6, 1876. Everything was regular except the second summons. The judges do not in their judgments set out the facts clearly, but from the case stated by the justices it appears that the second summons was issued by virtue of the original application of the woman made on July 6, 1876. That application was therefore the basis of the second summons. In my opinion it would be dangerous to allow the mere issue of a summons although nothing further is done to be effective for all time so that the summons operates for all time as one which could be altered at any time and an affiliation order made on the new date of hearing inserted in the summons. In my judgment the

(1) 4 C. P. D. 322. (2) 4 Q. B. D. 291.

altered summons was equivalent to a second summons, and the present case is therefore within the decision in *Tozer* v. *Lake* (1), and therefore we ought to hold that the altered summons was a second summons issued by the respondent at the time she was a married woman and that the order made by the justices was bad.

PICKFORD J. I am of the same opinion. The question raised in the case is a difficult one and is made more difficult because we have to deal with it upon an artificial state of facts and upon the assumption that certain proceedings were regular which in fact were irregular.

The respondent was seeking to affiliate a child upon the appellant and she made an application for a summons on April 26, 1911, she being at that time a single woman. That summons called upon the appellant to appear before the justices on May 16, 1911, but it was not served because the appellant had gone away. He did not come back till January, 1912. The respondent thereupon applied to the clerk to the justices that the date of hearing in the summons should be altered. The summons was accordingly altered and served and came on for hearing on February 20, 1912. Those proceedings appear to me to have been irregular, but for the purposes of this case we have to assume that they were regular. It seems to me that what was done was in effect to issue a new summons returnable on February 20, 1912. It was in substance a fresh summons issued under the application of the respondent made by her after her marriage, and it was issued either by virtue of the original application, and *Tozer* v. *Lake* (1) decides that under such circumstances the affiliation order cannot be made, or it was issued on the application of the respondent made when she was a married woman, in which case equally no order could be made upon it. If the only question had been as to the effect of the respondent's marriage upon the power to make an order, i.e., if all the proceedings up to the affiliation order had been regular and taken before the marriage and only the order had been made

(1) 4 C. P. D. 322.

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after the marriage, I think the order would have been good. But the date fixed for the hearing in the original summons had long passed and it had not been adjourned, and what was done was that something equivalent to a fresh summons was issued after the respondent's marriage. The case therefore falls exactly within the decision in *Tozer* v. *Lake* (1), and it follows that the order was bad.

AVORY J. I am of the same opinion. It must not be taken from our judgment that we affirm the legality of any such proceeding as the clerk to the justices altering the date of hearing named in the summons so as to make the summons effective. But no objection has been taken upon that ground, and we are therefore taking the most favourable view to the respondent in assuming that there was an effective summons issued in January, 1912. *Ex parte Fielding* (2) is in my opinion an authority in favour of the appellant. In that case the information was laid on October 23, 1860, and a summons issued upon it was not served. On July 5, 1861, another summons was issued by the same justice reciting that the "information and complaint was on 23rd October last made . . . . by Eliza Harden . . . . single woman . . . ." and the point was taken that the second summons was not issued upon any application made by the woman. It was contended that there had been no application by the woman on July 5, 1861, within the meaning of the statute, and that therefore the second summons could not be issued. Wightman J. said "The best evidence of the application was the issuing of the summons." The justices had recited in their order that the application was made on July 5. It was therefore considered that to make the order good it was necessary that it should contain a statement that an application was then made. That case is therefore an authority for the proposition that the issue of a summons is evidence that an application was made on the same day, and it follows that the application in the present case must be deemed to have been made in January, 1912. At that time the respondent was not a single

(1) 4 C. P. D. 322. (2) 25 J. P. 759.

woman, and therefore the application was not made by a single woman and no order could be made upon it.

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Appeal allowed.

Solicitors for appellant: *Walmsley & Stansbury, for W. W. Whiteman, Nuneaton.*

Solicitors for respondent: *Griffith & Gardiner, for Maddocks, Ogden & Co., Coventry.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1902

April 30; May 1; June 14

DOLEMAN & SONS *v.* OSSETT CORPORATION.

Arbitration—Contract for Execution of Works—Provision for Reference of Disputes under Contract—Award subsequent to Action brought on Contract—Invalidity of Award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 1, 4.

Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, and is pending, no application to stay the action having been made under s. 4 of the Arbitration Act, 1889, or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid, and will not afford a defence to the action.

By a clause in a contract between the plaintiffs and the defendants, a municipal corporation, for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt, or difference arising or happening touching or concerning the works, or relating to quantities, qualities, description, or manner of work done, executed, or to be done and executed by the contractors, or in any wise whatever relating to the interests of the said corporation or of the contractors, such doubts, disputes, or differences should from time to time be referred to and settled and decided by the defendants' engineer, who should be competent to enter upon the subject-matter of such doubts, disputes, or differences with or without formal reference or notice to the parties to the said contract, or either of them, and who should judge, decide, order and determine thereon.

The plaintiffs brought an action against the defendants for sums which they alleged to have become due to them from the defendants under the contract, and for damages for wrongful termination of the contract by the defendants. The defendants did not apply for a stay of proceedings in the action under s. 4 of the Arbitration Act, 1889.

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Subsequently to the commencement of the action, the defendants' engineer, under the before-mentioned clause, without giving notice to the parties, and without the knowledge or consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action, and the defendants pleaded his award in bar to the plaintiffs' claim in the action:—

Held (reversing the decision of Scrutton J.) by Fletcher Moulton L.J. and Farwell L.J., Vaughan Williams L.J. dissenting (1), that it was not competent for the engineer to determine the matters in question, pending the action, and that therefore his award was no bar to the plaintiffs' claim in the action.

APPEAL from a judgment of Scrutton J. in an action as after mentioned.

The action was brought on June 9, 1910, by the plaintiffs upon a contract made between themselves and the defendants, a municipal corporation, for the construction by the plaintiffs of certain sewage disposal works at the Spa Outfall Works, Ossett, in the county of York, in accordance with specifications, conditions, plans, drawings, and quantities prepared by an engineer employed by the defendants, to recover sums alleged by the plaintiffs to be due to them from the defendants under the contract and damages for wrongful termination of the contract by the defendants.

In paragraph 2 of their statement of defence, inter alia, the defendants set out clause 32 of the conditions incorporated in the contract, which provided that "in case of any dispute, doubt, or difference arising or happening touching or concerning the works, or relating to quantities, qualities, description, or manner of work done, executed, or to be done and executed by the contractor, or to the quantity or quality of the materials to be employed therein, or in respect to any additions, deductions, alterations, or deviations made in, to, or from the works, or any part of them . . . . or in any wise whatever, relating to the interests of the said corporation, or of the contractor, such doubts, disputes, or differences shall, from time to time, be referred to and be settled and decided by the engineer, who shall

(1) It will be observed that Vaughan Williams L.J., though he dissented from the view taken by the other members of the Court on the question dealt with in the headnote, agreed with them on other grounds in allowing the appeal.

be competent to enter upon the subject-matter of such doubts, disputes, or differences with or without formal reference or notice to the parties to the said contract, or either of them, and who shall judge, decide, order and determine thereon; and to the engineer shall also be referred the determination of the sum or sums, or balance of money to be paid to or received from the contractor by the corporation, and the directions, decisions, admeasurements, valuations, certificates, orders, and awards of the engineer (which said directions, decisions, admeasurements, valuations, certificates, orders, and awards respectively may be made from time to time) shall be final and binding upon the corporation and the contractor respectively . . . ."

Among other matters, by paragraph 3 of the statement of defence, the defendants pleaded that: "The whole of the matters the subject of this action as well as the matters alleged in the counter-claim hereinafter pleaded are disputes, doubts, or differences within the meaning of clause 32 of the general conditions hereinbefore set out, and have been referred to and settled and decided by the defendants' said engineer as therein provided, as appears by his certificate or award dated October 19, 1910. The said certificate or award is conclusive and binding on the plaintiffs, and the defendants will object that they are not entitled to reopen the matters thereby determined. Alternatively it is a condition precedent to this action that the matters aforesaid should be referred to, and settled and decided by the said engineer."

By their reply the plaintiffs pleaded, inter alia, as follows: "2. The plaintiffs will contend that it was not competent for the defendants' engineer to make the alleged, or any, certificate or award on October 19, 1910, and that the alleged certificate or award of October 19, 1910, is invalid and not binding upon the contractors. At the date of the said alleged certificate or award this action was pending, and previously thereto the defendants had taken steps in the proceedings in the action which precluded them from proceeding to arbitration upon any of the matters which are the subject of this action. 3. Further the said certificate or award is invalid inasmuch as it was made without notice of any kind (formal or informal) to the plaintiffs that the

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defendants' engineer intended to enter upon the subject-matter of any disputes or differences, or to make or purport to make any certificate or award in reference thereto, and consequently the plaintiffs were afforded no opportunity of being heard by the said engineer upon the said matters or any of them."

The defendants had made no application for a stay of proceedings in the action under s. 4 of the Arbitration Act, 1889.

The action was referred by an order of the Dewsbury district registrar to the official referee, but upon appeal the judge at chambers on June 28, 1911, varied his order by ordering that "the preliminary questions raised by paragraph 3 of the defence, and paragraphs 2 and 3 of the reply, in so far as they relate thereto, be tried before the other issues in the action by a judge and jury at Leeds."

The said preliminary questions came before Scrutton J. at Leeds, when by consent the jury were discharged, and the questions were argued before the learned judge, who decided and declared "(1.) that it is not a condition precedent to this action that the subject-matters are to be referred to and decided by the engineer; (2.) that any decisions of the engineer on the matters on which he is empowered to decide under clause 32 are binding on the parties though made without notice to them, and though made after writ."

The plaintiffs appealed against the second of the above-mentioned declarations by the learned judge.

For the purposes of the appeal the award of the engineer was taken to have been made as aforesaid without notice to the parties, and without the knowledge or consent of the plaintiffs. [See as to this the statements in paragraph 3 of the reply, and the terms of the declaration made by Scrutton J.]

April 30, May 1. *T. P. Perks*, for the plaintiffs. Where an action has been commenced, and no order for a stay has been obtained under s. 4 of the Arbitration Act, 1889, the fact that an award is made subsequently under a previous agreement for arbitration in reference to the matter in dispute in the action cannot oust the jurisdiction of the Court to decide that matter. Such an award is invalid. It has been held that a plea of a

pending arbitration with reference to the subject-matter of the action is a bad plea: *Harris* v. *Reynolds*. (1) A plea of an award made after action brought under an agreement for reference to arbitration made before action is equally bad for the same reasons. [He also cited *Scott* v. *Avery* (2); *Thompson* v. *Charnock* (3); *Livingston* v. *Ralli* (4); *Dawson* v. *Fitzgerald*. (5)]

E. Tindal Atkinson, K.C., and *J. A. Compston*, for the defendants. The award made after action brought under a previous agreement for reference affords a good defence, as amounting to an accord and satisfaction, which may be pleaded as a plea to the further maintenance of the action. This does not involve any ouster of the Court's jurisdiction any more than a plea of payment after action. Any ouster of the jurisdiction that arises in a case like this arises not from the contract, but from the provisions of s. 1 of the Arbitration Act, 1889. The Arbitration Act, 1889, s. 1, provides that a "submission," unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court or a judge, and shall have the same effect as if it had been made an order of Court; and by s. 27 "submission" means any written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. The plaintiffs' contention involves that a party to a submission may revoke it without leave by bringing an action. [They cited on this point *In re Smith & Service and Nelson & Sons*. (6)]

Secondly, clause 32 of the conditions of the contract does not constitute the engineer an arbitrator in the sense that he has to exercise judicial functions thereunder. The effect of that clause merely is that the parties contract that, with regard to any matters in dispute in relation to the works, their contractual rights shall be as certified by the engineer. The provision that he may act under the clause without any formal reference or notice to the parties indicates that he is not intended to be placed in the position of an arbitrator. There is therefore no question

(1) (1845) 7 Q. B. 71.
(2) (1853) 8 Ex. 487; (1855) 5 H. L. C. 811.
(3) (1799) 8 T. R. 139.
(4) (1855) 5 E. & B. 132.
(5) (1876) 1 Ex. D. 257.
(6) (1890) 25 Q. B. D. 545, 550.

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of ousting the jurisdiction of the Court. [They also cited *S. Pearson & Son, Ld.* v. *Dublin Corporation* (1); *Tullis* v. *Jacson.* (2)]

Cur. adv. vult.

July 13. The following judgments were read.

VAUGHAN WILLIAMS L.J. The object of the 11th section of the Common Law Procedure Act, 1854, was to render more effective an agreement to substitute arbitration for the process of a Court of law. Such an agreement, as far as the intention of the parties to it is involved, was an agreement that they would not proceed in a Court of law, but was not intended to prevent the parties going on with an action, if the arbitration went off. The agreement could not be pleaded in bar to an action.

The state of the law before the passing of the Common Law Procedure Act, 1854, was that there were no means whereby one party to an agreement of reference could compel the other party to go before the agreed arbitrator. The agreement of reference could not be enforced, and there were no means whereby the bringing an action dealing with the very subject-matter of reference could be restrained. It was to remedy this state of things that s. 11 gave the power to stay an action at law dealing with the same subject-matter as was covered by the agreement of arbitration. I can find nothing in the Common Law Procedure Act, 1854, or in the Arbitration Act, 1889, which suggests a stay of the agreed arbitration on the ground that there was an action pending which had not been stayed, nor do I find in any case reported any suggestion that to go on with an arbitration pending a common law action was a contempt of Court.

The pendency of an arbitration is a bad plea, because an agreement to arbitrate does not oust the jurisdiction of the Court: see *Thompson* v. *Charnock* (3), *Mitchell* v. *Harris* (4), and *Harris* v. *Reynolds.* (5) There is certainly nothing in any of these cases to suggest that the pendency of the arbitration was itself a contempt of Court in a case where the action was actually pending at

(1) [1907] A. C. 351.
(2) [1892] 3 Ch. 441.
(3) 8 T. R. 139.
(4) (1793) 2 Ves. 129, 136.
(5) 7 Q. B. 71.

the time when the proceedings before the arbitrator commenced. An award may be pleaded in an action if it amounts to a new accord and satisfaction.

It has been suggested that it is impossible that the two proceedings, the one under the reference to arbitration, and the other the subject of a pending action, can possibly be allowed to go on together, because there might in such a case be a race between two concurrent proceedings. But the case of *Lucas* v. *Kermode* (1) shews clearly that an award made can be pleaded pending an action puis darrein continuance. And in the case of an award in favour of the defendant, inasmuch as the award orders no payment, a plea of award does not require any further satisfaction.

It is said that such a position is impossible and inconsistent with the dignity of the Court in which the action is going on, and further that, if such concurrent proceedings could have always gone on together, the 11th section of the Common Law Procedure Act, 1854, was quite unnecessary, for that, independently of any order to stay the action, the arbitration could effectively go on and obtain priority of decision, and then the award might be pleaded puis darrein continuance.

In my opinion the object of the Legislature under the Act of 1854 was to enable effect to be given to the arbitration agreement before the action was tried, and the method of achieving this was to provide for a stay of the pending action by an order of a judge at chambers made in the exercise of his discretion. This order did not oust the jurisdiction of the Court, but was based on an exercise of that jurisdiction, and I do not think that the refusal of an order to stay the action operated as a stay of the arbitration proceedings. The whole object of the Legislature was to give efficacy to the intention of the parties in making the agreement of reference by staying the action pending the arbitration proceedings; and the only effect of failing to obtain the order to stay the action was to leave the parties in the same position in which they were before the passing of the 11th section of the Common Law Procedure Act, 1854, i.e., in the position that the jurisdiction of the Courts was not ousted, and

(1) (1818) 8 Taunt. 146.

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that the Court ignored the pendency of the arbitration, and therefore held a plea of pendency of an arbitration in the same matter to be bad, but allowed the plea of an executed award to be good, and I think allowed it to be good even if the award was executed after action brought. It was allowed, in fact, as accord and satisfaction completed after action. As between the parties the agreement of reference was not revoked by the refusal of the judge at chambers to grant a stay of the action. It is true that, generally speaking, the obstacles in the way of the arbitrator, if one of the parties refuses to attend, are so great that it is difficult, and sometimes practically impossible, for the arbitrator to go on with the arbitration; but if the arbitrator gets over these difficulties, and goes on and makes his award, I think his award constitutes accord and satisfaction. I think that it was practical considerations of this sort which led the Legislature to make no provision, in cases where the order for staying the action was refused, for staying the arbitration proceedings or declaring the agreement of reference null and void.

I have now to deal in particular with the case before Scrutton J. An order was made on June 28, 1911, as follows: "It is ordered that the preliminary questions raised by paragraph 3 of the defence and paragraphs 2 and 3 of the reply, in so far as they relate thereto, be tried before the other issues in the action by a judge and jury at Leeds and that the costs of this application be costs in the cause." Then the certificate of the associate runs thus: "I certify that the questions in this action ordered to be tried at the Leeds Assizes were tried before the Honourable Court by Mr. Justice Scrutton, one of His Majesty's Justices of the High Court of Justice, by consent of the parties without a jury at Leeds on the 28th and 31st July and it was then decided and declared as follows, namely, that it is not a condition precedent to this action that the subject-matter should be referred to and decided by the engineer, and that any decisions of the engineer"—this is an important point—"on the matters on which he is empowered to decide under clause 32 are binding on the parties, though made without notice to them, and though made after writ."

I cannot myself see any advantage accruing to any one in a trial before a judge of the so-called preliminary questions. The

trial of the facts will still have to take place, and it seems to me that some at least of the preliminary questions raised by paragraph 3 of the defence and paragraphs 2 and 3 of the reply might well be affected by the facts found on the ultimate trial.

Assuming that the matters or some of them, the subject of this action, or the matters alleged in the counter-claim are disputes, doubts, and differences within the meaning of clause 32 of the conditions, yet it is possible that the facts alleged and proved in evidence in support of the reply and particulars may render the engineer unfitted to deal justly and fairly with the matters he purports to deal with in his award. If this be so I think that the so-called preliminary questions should not be determined until the conclusion of the whole trial. I think it would be most conducive to justice to follow this course. Indeed I think the order in the Dewsbury District Registry on June 28, 1911, ought never to have been made, but, as there has been no appeal against that order, the only way to put matters right is to hold that the declaration "That any decisions of the engineer on matters on which he is empowered to decide under clause 32 are binding on the parties, though made without notice to them, and though made after writ," is too wide and uncertain, and that the whole declaration therefore ought to be set aside, and all questions tried in the ordinary way at the coming trial, and I am inclined to do this.

So far as the practical result of my judgment is concerned, it does not differ from the practical result of the judgments which have been communicated to me of my colleagues. But there is an essential difference in the mode of arriving at the conclusion. My brothers, as I understand, are prepared to hold that the award thus made pending the trial of the action is of no effect. Of course if that is so the whole case must be tried at the assizes. My conclusion is practically the same although it is based on different considerations.

FLETCHER MOULTON L.J. The action in which this appeal is brought is in respect of a claim by the plaintiffs, who are builders and contractors, against the defendants under and in respect of a contract to execute certain engineering works at

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Spa Outfall, Ossett. The defendants have put in a statement of defence and counter-claim to which in their turn the plaintiffs have put in a reply and defence to the counter-claim. Apart from questions of fact, these pleadings raise certain issues of law, and by an order dated June 28, 1911, it is ordered that the preliminary questions raised by paragraph 3 of the defence and paragraphs 2 and 3 of the reply, in so far as they relate thereto, be tried before the other issues. They have been tried by Scrutton J. sitting at Leeds, and he has decided them and given the consequent declarations. The only one that is material to the present appeal reads as follows: "That any decisions of the engineer on matters on which he is empowered to decide under clause 32 are binding on the parties, though made without notice to them, and though made after writ."

The plaintiffs appeal against so much of that judgment as declares that the decision of the defendants' engineer by a certificate or award dated October 19, 1910, was binding upon the plaintiffs. That certificate is for the purposes of this appeal to be taken to have been made without notice to the parties, and it was certainly made after the issue of the writ, which was on June 9, 1910. The appeal therefore challenges the whole of the above declaration.

Before examining the language of clause 32 of the contract sued on herein, I propose to examine a point of great general interest raised by the decision. The learned judge has decided, in substance, that clause 32 is an arbitration clause whereby the parties agreed to submit all disputes under the contract to the engineer, and that the certificate of October 19, 1910, is an award duly made by him as such arbitrator. But it was made after action brought, and the question raised, therefore, is whether, when an action has been brought upon a contract containing an arbitration clause, in respect of a matter coming within that clause, and the defendant does not apply to stay the action under s. 4 of the Arbitration Act, 1889, an arbitration can still go on notwithstanding the pendency of the action in respect of the same matter, and an award made in it can be pleaded in the action in bar to the claim.

By English law the Courts are the recognized machinery for

settling disputes between the parties to contracts. A complainant by taking out a writ can cause his opponent to be ordered to appear before the Court, and the parties must accept its decision. But it has long been a practice in certain classes of contracts for the contracting parties to name a private tribunal to whom contractually they give authority to settle disputes under that particular contract. If a dispute has been brought before the private tribunal thus constituted, and an award made, that award is binding on both parties and concludes them as to that dispute. In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of "accord and satisfaction by substituted agreement." The original rights of the parties have disappeared, and their place has been taken by their rights under the award.

Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a Court of law to enforce his rights under the contract. The answer which the Courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the Courts of law could be valid, but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the Courts. In other words they decided that the jurisdiction of the Courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under such a submission. Neither a general agreement to submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitrator, nor even the pendency of an arbitration thereon, could be pleaded in answer to a claim in an action.

In thus deciding they did not nullify the effect of arbitration clauses. On the contrary they held that, if in breach of such a clause one of the parties brought an action, the other could sue him in contract for the breach, and recover such damages as a

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jury might award. It will be evident, however, that the remedy in damages must be an ineffective remedy in cases where the arbitration had not been actually entered into, for it would seem difficult to prove any damages other than nominal. In the case of an arbitration pending, which was rendered abortive by the action, substantial damages might perhaps be proved, because it would be open to the jury to give damages commensurate with the costs to which the plaintiff had been uselessly put in the arbitration. But, speaking generally, this treatment of arbitration clauses by the Courts of law made it very difficult for a party to secure the advantages of a special tribunal for disputes under a contract, advantages which in such cases as building contracts are very substantial. To remedy this, the Legislature by the Common Law Procedure Acts introduced the machinery which is now provided for by s. 4 of the Arbitration Act, 1889. It enables the defendant to an action brought in breach of an agreement to proceed by arbitration to apply to the Court to stay the action, and the Court is given power so to do. Prior to these statutable provisions the Court could not refuse to settle any such dispute which was brought before it, because it not only had the jurisdiction but also the duty to decide that dispute if called upon so to do. It has under these provisions power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. But the statute very properly requires that the necessary application so to do should be made by the defendant immediately on appearance and before taking any step in the action. If the defendant allows the action to proceed for a while, he cannot subsequently withdraw it from the Courts. If the Court thus refuses its assistance to the plaintiff, he is driven to have recourse to arbitration as his sole means of obtaining redress, and thus the original agreement to submit the matter to arbitration is indirectly enforced.

The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but, if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other

remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is functus officio, unless the parties agree de novo that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which s. 4 of the Arbitration Act, 1889, applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal which should be the first to give a decision in the matter. The learned judge has decided that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the decision of the arbitrator, and not that of the Court, decides the rights of the parties. If this were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the Court in a most igominious way.

There is nothing strange in the conclusion that the Court has sole seisin of the dispute where it has allowed the action to proceed. Speaking generally, it was not the practice of the Courts of common law to compel the specific performance of a contract. A party to a contract might break it subject to the

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liability to pay damages, i.e., to give full pecuniary compensation to the other party for the loss he suffered from the breach. To obtain specific performance application must be made to Chancery. But Chancery would only specifically enforce certain types of contract, of which a contract to refer to arbitration was not one. Hence a party to a contract containing an arbitration clause might refuse to perform it, and the sole remedy of the other party was an action for damages for the breach. The bringing of an action in respect of a dispute under the contract is such a breach, and the sole remedy under the common law was an action for damages, and it would still be so were it not for the provisions of s. 4 of the Arbitration Act, 1889. If for any reason the action is not stayed by the Court, the dispute must be decided by it. There were two competent tribunals, the Court and the arbitrator. The plaintiff contracted to choose the latter. He has in fact taken the former, and must pay the damages, if any, caused by his breach of contract. But that does not affect the fact that the dispute is before the Court and that it can and must decide it.

There are no decisions which in any way conflict with these conclusions. Those cited are so wide of the point that in my opinion they do not call for examination.

Counsel for the respondents laboured to shew that this conclusion is inconsistent with the provisions of s. 1 of the Arbitration Act, 1889. This is not so. The supposed difficulty arises from confusing together two very distinct things, namely, a submission to an arbitrator and a contract to submit disputes to an arbitrator, i.e., an arbitration clause. By common law a submission to a particular arbitrator was revocable at the will of either party, unless it had been made a rule of Court, in which case the leave of the Court must be previously obtained. But this was of the nature of a rescission. Such a revocation involved the breach of no contract, and gave rise to no right of damages. It was merely an exercise of a legal power to revoke which was implied in a submission. On the other hand (as was pointed out by Bowen L.J. in *In re Smith & Service and Nelson & Sons* (1)) an arbitration clause could no more be revoked than could any other clause of

(1) 25 Q. B. D. 545.

a contract. Like any other contractual obligation it could be broken, and thereby a claim to damages would arise. But there was no right to rescind such a contract or contractual obligation. Sect. 1 of the Arbitration Act, 1889, relates merely to the right to revoke a submission. It has nothing to do with the matters provided for by s. 4 of that Act.

I am therefore of opinion that, so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and that the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of s. 4 of the Arbitration Act, 1889, but if he neglects so to do, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute.

It is now necessary to turn to clause 32 of the contract between the parties in this case, in order to see whether it is wholly, or to some and to what extent, an arbitration clause. The material part of the clause is set out on p. 3 of the statement of defence. It provides shortly that in case of any doubt, dispute, or difference under the contract, it shall "from time to time be referred to and be settled and decided by the engineer." These words are so clearly words implying a judicial determination such as constitutes an arbitration that it would require very clear language to the contrary in the rest of the clause to make me doubt that the clause was intended to be an arbitration clause. The accompanying words which are relied upon by the respondents as shewing that it is not a clause providing for a judicial determination by an arbitrator appear to me to have, if anything, the contrary effect. They are as follows: "who shall be competent to enter upon the subject matter of such doubts, disputes or differences with or without formal reference or notice to the parties to the said contract, or either of them, and who shall judge, decide, order and determine thereon." This appears to me to imply that it is a reference to him, although the formalities which usually attend such references may be omitted. The fact that notice need not be given to the parties to the said contract, or either of them, does not affect these conclusions. It is an exceptional

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power, but seeing that in his position the engineer would naturally have in many cases all the relevant evidence in his own possession, it is not surprising that the parties may have thought that in certain cases he would be in a position to act judicially without giving notice to the parties, and they no doubt had confidence that he would not exercise this extraordinary power excepting in proper cases. Such a provision, though most unusual, does not go to the root of the matter. He is still a private tribunal contractually endowed with the necessary powers, and the bringing the action is just as much a complete breach of that obligation of the contract, so far as the disputes in question are concerned, and therefore a termination of his powers, as it would be if he had not been relieved of the necessity of conducting the arbitration with all the usual formalities.

It follows, therefore, that I am of opinion that the certificate of October 19, 1910, was legally an award, and that, as it was given subsequently to the commencement of the action, it has no effect or validity. At the date on which it was given the disputes were before the High Court and could be decided by it alone and by no other tribunal.

This appeal must therefore be allowed, and the declaration in question be discharged.

FARWELL L.J. It is well settled that a plea of an agreement to refer the subject-matter of the action to arbitration is a bad plea, but that a plea of an award duly made before action under an agreement between the parties is a good plea of accord and satisfaction. It is also clear that any binding agreement between the parties settling all the disputes raised in the action made after writ is a good defence as a plea puis darrein continuance (now pleaded under Order XXIV.), whether such agreement is a direct settlement between the parties themselves, or made by means of a third person to whom they have referred the dispute after writ, or by means of an award made after writ in an arbitration existing before writ, if both parties subsequent to writ carry on the arbitration, and agree to an award being made notwithstanding the action. But this is because it is always open to litigants to settle their differences after writ as they please.

The case is quite different if there is no such agreement after writ.

In the present case the contractors brought an action in respect of matters which I assume to be within an arbitration clause in the agreement sued on: by the terms of the clause the arbitrator was empowered to make his award without notice to, and in the absence of the parties: after writ the arbitrator did so make his award, and the defendants plead such award in bar. The preliminary question of law referred by the judge in chambers to be determined is whether this is a good plea. I am of opinion that it is not. The plaintiffs cannot be deprived of their right to have recourse to the Court when the agreement is a mere agreement to refer, unless the Court makes an order to that effect under s. 4 of the Arbitration Act. They can, of course deprive themselves of such right by their own act after writ, as for example by going on with the arbitration and obtaining an award; but, when nothing has been done by them since writ, and the only matter relied upon is an award made since writ without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement, because there is no act of the plaintiffs subsequent to the writ on which reliance can be placed, and is bad. It is not a question of revoking the submission; it is a question of the construction of s. 4 of the Act. It is impossible to suppose that the Court, on refusing an application to stay, and deciding that the action must go on, means to allow the arbitration to go on also with the result that the decision first obtained will prevail, or that one or other proceeding will be an idle waste of time and money. The result is the same, if the defendant (as here) pleads to the action, and disentitles himself to apply under s. 4. He thereby submits to the jurisdiction of the Court, which involves the same consequences as the refusal of an application under s. 4, except, perhaps, that in the latter case any attempt to proceed with the arbitration might be a contempt of Court, while in the former it might not. If this be not so, s. 4 seems to me useless: if the arbitration can go on against the will of the plaintiff after writ, what is the object of applying to stay the action? If the

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action goes on, can it be said that the Court is to enter upon a struggle for priority with the lay tribunal, and grant an injunction to restrain the arbitration proceedings, or entertain applications to advance the trial on the ground that they will be outstripped by the arbitrator? Such a position is to my mind an impossible one, inconsistent with the dignity of the Court and with the construction of the Act. The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant? Is one to be set off against the other, or which is to prevail? Or suppose that the arbitrator refrains from publishing his award in deference to a protest from the plaintiff who has succeeded in the action. Would such protest be a breach of the covenant to refer, and entitle the defendant to his action for damages against the plaintiff? It appears to me impossible to allow more than one proceeding to continue without landing the Court and the parties in inextricable difficulties.

With all respect to Scrutton J., I do not think it is a question of public policy. It is rather a question of the settled practice of the Court. In my opinion this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Walker & Rowe, for G. E. B. Blakeley, Dewsbury.*

Solicitor for defendants: *Arthur E. Burton, for Scatcherd, Hopkins, Middlebrooks & Brighouse, Leeds.*

E. L.

LADENBURG & CO. *v.* GOODWIN, FERREIRA & CO., LIMITED (IN LIQUIDATION) AND GARNETT.

1912
July 10.

Company—Sale of Goods—Hypothecation of Proceeds—Charge on Book Debts—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93, *sub-s.* 1 (*e*).

The defendant company, carrying on business as merchants in Manchester, consigned goods to their customers in South America, and, in order to obtain advances from the plaintiffs, who were bankers, wrote to the plaintiffs enclosing for their acceptance the company's drafts drawn in respect of specified shipments then being made and copies of the bills of lading and of the invoices relating thereto, and stating that the defendant company hypothecated the goods or the proceeds thereof to the plaintiffs. As between the defendant company and their customers the terms of sale were such that the property in the goods passed on shipment to the customers to whose orders the bills of lading were drawn. The plaintiffs having accepted drafts in the above circumstances, and the defendant company having gone into liquidation, the plaintiffs claimed to be entitled to the proceeds of the goods as against the liquidator:—

Held, that the effect of the transaction was that the defendant company had created a charge on the company's book debts within s. 93, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908, which charge, not having been registered as required by the section, was void as against the liquidator, and that the plaintiffs' claim, therefore, failed.

Action in the commercial list tried by Pickford J. without a jury.

The plaintiffs were merchant bankers in London. The defendant company had for many years previously to August, 1911, carried on business in Manchester as merchants trading with South America. In August, 1911, the defendant company went into voluntary liquidation, and the defendant Garnett was appointed liquidator.

In 1904 the defendant company approached the plaintiffs with a view to obtaining advances from them against shipments made by the defendant company to their customers, and the following letters passed between the parties. On August 22, 1904, the plaintiffs wrote to the chairman of the defendant company: "We shall be very pleased to accept the drafts of your firm Messrs. Goodwin, Ferreira & Co., Manchester, to the extent of

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5000*l.* against duplicate bills of lading and invoices for shipment of merchandise to S. America and letters of lien on these shipments signed by your agents or customers . . . ." On August 23, 1904, the defendant company wrote to the plaintiffs: "We note with thanks that you are prepared to grant us a credit of 5000*l.* against indents shipped by us to South America . . . . The standing of our firm, our system of trading and the manner in which our transactions have been conducted during the last twenty odd years, do not admit of letters of lien being signed either by customers or agents; but on the other hand, we are quite ready to hypothecate the shipments to your good selves as a security at the time of handing you copies of bills of lading and particulars of invoices, and, further, shall undertake to cover drafts honoured with your signature a few days before maturity under similar circumstances . . . ." On August 25, 1904, the plaintiffs wrote to the defendant company: "We beg to acknowledge receipt of your favour of the 23rd inst. and to inform you that we find the contents of the same to be quite in order, and as desired take pleasure in giving you this confirmation, viz.:— that we are prepared to grant you a credit for 5000*l.* valid against your drafts drawn on us accompanied by duplicate bills of lading and copies of invoices of goods shipped to S. America and (as suggested by your good selves) a letter hypothecating the shipments or the proceeds to us . . . ."

Advances were made by the plaintiffs to the defendant company from time to time in accordance with the arrangement contained in the above letters. The course of business was for the defendant company to write to the plaintiffs enclosing a draft for the plaintiffs' acceptance drawn in respect of a specified shipment and enclosing copies of the bills of lading and invoices relating to the particular shipment and stating that the defendant company hypothecated the goods or the proceeds thereof to the plaintiffs. The goods were sold by the defendant company to their customers on the terms that all charges on the goods after they left the warehouse were paid by the customers, to whom a six months' credit was given. The bills of lading were made out to the customers' orders.

The claim in the present action related to 5300*l.*, the amount

of seven drafts accepted by the plaintiffs in March, April, and May, 1911. The letter from the defendant company enclosing the first of these drafts for the plaintiffs' acceptance was in the following terms: "We have to acknowledge receipt of yours of yesterday and now beg to enclose our cheque for 10*l.* 5*s.* 3*d.* being 5*s.* 3*d.* interest on Manchester cheque and 10*l.* in payment of accepting commission on draft L. 2098 for 1000*l.* at six months date which we enclose for favour of your acceptance and return to us. Relating to same we also hand you copies of bills of lading and abstract of invoices amounting to 1005*l.* 19*s.* 2*d.* which we hereby hypothecate to you or the proceeds thereof." The other drafts were accompanied by letters in similar terms. The plaintiffs alleged that they thereby became and were assignees or equitable assignees of the goods and proceeds.

The plaintiffs claimed the proceeds of the shipments received by the defendant company or the liquidator, and a declaration that the plaintiffs were secured creditors of the defendant company in respect of the bills of exchange drawn by the defendant company and accepted by the plaintiffs, and that the plaintiffs were entitled to the proceeds of the goods hypothecated and assigned by the defendant company to the plaintiffs.

The defendants by their defence pleaded that every assignment to the plaintiffs (if any, which was denied) was an assignment by way of mortgage or charge of book debts due to the defendant company and was, by reason of s. 93, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908 (1), void against the defendant Garnett as liquidator of the defendant company for want of registration.

It was admitted that the plaintiffs were entitled to prove in the liquidation of the defendant company for the full amount of their claim.

Langdon, K.C., and *Lush*, for the plaintiffs. The hypothecation of the proceeds of the sales is not a charge on book debts within

(1) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93, sub-s. 1, provides that "Every mortgage or charge created after the first day of July, 1908, by a company registered in England or Ireland and being . . . (*e*) a mortgage or charge on any book debts of the company;

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the meaning of s. 93 of the Companies (Consolidation) Act, 1908. A charge on a book debt is a charge on something which is still in the hands of the debtor. When by payment of the debt the proceeds of the sale come to the hands of the creditor there is no longer any book debt. If there were a charge on a book debt the plaintiffs would have been entitled to call upon the customers to pay them. It is clear from the correspondence that it was not intended that the security given to the plaintiffs should extend to the money while in the hands of the customers, but that as soon as the proceeds of the goods were received by the defendant company they were to be impressed with a trust in favour of the plaintiffs. It was never contemplated that s. 93 would apply to a bona fide business transaction of this kind. The section was designed to prevent companies when in financial difficulties from charging their outstanding assets and thus preventing them from becoming available for creditors: *In re Orleans Motor Co., Ld.* (1), per Parker J. [*Tailby* v. *Official Receiver* (2) was also referred to.]

Atkin, K.C., and *J. R. Randolph*, for the defendants. At the time the letter creating the charge was given the goods in question were already at sea, having been consigned to the customers on what were practically f.o.b. terms, with no rights reserved to the defendant company. The company had no longer any property in the goods, and therefore they could not give the plaintiffs a charge on the goods, and the only thing that could be charged was the proceeds of the goods. If the plaintiffs had given notice of the charge to the customers, the latter would not have been entitled to pay the company, and this shews that there was in the circumstances a charge on the book debts of the defendant company within s. 93.

Langdon, K.C., in reply. The letters shew that the primary intention of the parties was to give the plaintiffs a charge on the defendant company's interest in the goods whatever it might be. Even if the property in the goods had passed to the customer the defendant company would still have the right to stop the goods in transitu, which right would be subject to the

. . . . " shall be void against the liquidator of the company unless registered in accordance with the provisions of the section.

(1) [1911] 2 Ch. 41.

(2) (1888) 13 App. Cas. 523.

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hypothecation. A charge on a book debt must be created by a document with that intent, but if the document also creates a charge on the goods themselves, as is the case here, that is not a charge on a book debt within s. 93, because the money is payable to the mortgagee by reason of the charge on the goods. [He cited *In re Hamilton, Young & Co.* (1); *Lutscher* v. *Comptoir d'Escompte de Paris* (2); *North Western Bank* v. *Poynter*. (3)]

PICKFORD J. This case raises a new point depending on the meaning of s. 93 of the Companies (Consolidation) Act, 1908. The transactions in question were between bankers and a trading company to whom the bankers made advances on the security of goods or the proceeds of goods. The arrangement under which these transactions were entered into is contained in certain letters which passed between the plaintiffs and the defendant company. [The learned judge read the letters of August 22, 23, and 25, 1904, set out above, and continued:] In my opinion these letters shew that the intention of the parties was that the defendant company was to give to the plaintiffs a mortgage or equitable security on goods where they could do so or where it could be enforced against the goods, and that where the security could not be given on, or could not be enforced against, the goods there was to be an hypothecation of the proceeds of the goods. Unless that was the intention, it seems to me that no meaning can be given to the words in the plaintiffs' letter of August 25 "hypothecating the shipments or the proceeds thereof to us."

The first of the letters dealing with the particular transactions now in question was that of March 16, 1911. [The learned judge read the letter.] The other letters are to the same effect. The different transactions were substantially all of the same character. The defendant company sold goods to their customers in South America on what were practically f.o.b. terms and gave six months' credit. The goods were consigned to the customers on bills of lading made out or indorsed to the customers' orders, so that the customers had full right and power over the goods, and the property in the goods passed to them.

(1) [1905] 2 K. B. 772. (2) (1876) 1 Q. B. D. 709.
(3) [1895] A. C. 56.

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In the circumstances of this case it is difficult to see how any valid charge or mortgage on the goods could have been given to the plaintiffs, for there was no interest in the goods remaining in the defendant company (except in the possible case of stoppage in transitu). Therefore the only thing remaining which could be the subject of the hypothecation was the proceeds of the goods. The proceeds of the goods are the invoice values which have to be paid by the customers. That constitutes a book debt owing by the customer to the defendant company. The question which arises in this case is whether the result of the transactions between the defendant company and the plaintiffs is that there is a charge on the book debts of the defendant company within the meaning of s. 93 of the Companies (Consolidation) Act, 1908. It is said on behalf of the plaintiffs that this was not a charge on the book debts of the defendant company, because the letter of hypothecation did not bind the money in the hands of the customer and gave the plaintiffs no right to call upon the customer to pay the plaintiffs instead of the defendant company. I think it is correct to say that so long as no notice of the charge was given to the customer it did not bind the money while it was still in the hands of the customer. But there was nothing to prevent the plaintiffs from perfecting the charge by giving notice of it to the customer, in which case the plaintiffs would have been entitled to collect the money from the customer. No notice of the charge was in fact given by the plaintiffs to the customers, but it is said that when the money is paid by the customers to the defendant company or to the liquidator it becomes impressed with a trust in favour of the plaintiffs. I am unable to see how this suggested trust could arise unless there had previously been a charge on the money. I think there was a charge on the money which was to be paid for the goods and until the money was in fact paid it was a book debt of the defendant company; and the money when received could only become impressed with a trust in favour of the plaintiffs because before it was paid and while it was still a book debt it was subject to the charge. Then, was it a charge on the book debts of the defendant company within the meaning of s. 93, sub-s. 1 (*c*), of the Companies (Consolidation) Act, 1908? I think that it is highly probable that what was

primarily contemplated by that section was, as was pointed out by Parker J. in *In re Orleans Motor Co., Ld.* (1) with regard to s. 212 of the same Act, a case of a company in extremis giving a general charge to secure past debts, but s. 93 is not confined to cases of that sort. The language used is quite general and applies to a charge "on any book debts of the company." Therefore if there is a charge on any book debt of a company it is within the section although the particular kind of transaction on which the charge is created may not have been within the contemplation of the framers of the Act.

I therefore come to the conclusion that there were in this case charges on the book debts of the defendant company, and as they were not registered they are void against the liquidator, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Sampson & Price, Manchester.*

(1) [1911] 2 Ch. 41.

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Feb. 2, 12, 13, 24.

[IN THE COURT OF APPEAL.]

FRY AND ANOTHER *v.* SMELLIE AND ANOTHER.

Principal and Agent—Authority of Agent to borrow—Authority of Agent to pledge Shares for particular Sum—Pledge of Shares for lesser Sum—Blank Transfer—Notice of Limitation of Authority—Liability of Principal.

The registered holder of shares in a public company handed to an agent the indicia of title together with a transfer of the shares signed in blank, and instructed him to borrow not less than a certain sum on the security of the shares. The agent, in defiance of his instructions, borrowed upon the shares a less sum than the stipulated amount:—

Held that, as against the principal, the lender was entitled to retain the indicia of title to the shares until repayment of the amount of his loan.

France v. *Clark* (1884) 26 Ch. D. 257, distinguished.

Brocklesby v. *Temperance Permanent Building Society* [1895] A. C. 173 applied.

APPEAL of the defendant Smellie against a decision of Scrutton J.

By the statement of claim the plaintiffs alleged that at all times material to the action they were the owners and registered holders of 500 fully paid shares in the Roumanian Oilfields, Limited; that on July 21, 1910, they handed to the defendant Taylor certain documents appertaining to the said 500 shares together with a blank transfer of the shares signed by them, and authorized him to use the said documents and the said blank transfer for the purpose only of obtaining a loan for the plaintiffs of 250*l.* and no less upon the security of the said shares; that the defendant Taylor, wrongfully and in breach of the said authority, deposited the said documents and the said blank transfer or some of them with the defendant Smellie for purposes other than those authorized and without procuring the said loan or any part thereof for the plaintiffs; that the defendants, or one or other of them, had made use of the said documents or some of them for the purpose of obtaining from the said Roumanian Oilfields, Limited, a certificate or certificates of the said 500 shares and the said certificate or certificates was or were now held by the defendant Smellie; that the

defendant Smellie received the said documents or some of them and the said certificate or certificates and the said blank transfer without making reasonable and proper or any inquiry as to the defendant Taylor's title to the said documents or blank transfer or right to obtain the said certificate or certificates or as to his authority to deal with the same: that the plaintiffs had requested the defendants to return the said documents and to hand over to them the said certificates so obtained as aforesaid, but the defendants had refused to do so; and that the plaintiffs had suffered damage by reason of the wrongful conversion or detention of the said documents and certificate or certificates. The plaintiffs claimed (1.) the return of the said documents and the said certificate or certificates; (2.) damages for the said wrongful conversion or detention.

By his defence the defendant Smellie admitted that the plaintiffs were the registered holders of the said shares, but not that they were the owners thereof. He admitted that he had obtained (and still held) a certificate for the said shares by presenting to the said company certain documents of June 29, 1910. He admitted that the defendant Taylor had the authority of the plaintiffs to use the said documents for the purpose of obtaining a loan thereon, but he did not admit that the said authority was limited as alleged or at all. The said documents and blank transfer were handed by the defendant Taylor to the defendant Smellie, who advanced thereon the sum of 100*l.* on the terms of a letter dated August 17, 1910. The defendant Smellie was and always had been ready and willing to treat the transaction between himself and the defendant Taylor as a loan, and was now ready and willing to deliver up the said certificate on payment of such an amount and of his costs as mortgagee. If, contrary to the defendant Smellie's contention, the defendant Taylor had not the plaintiffs' authority to deal with the said shares as aforesaid, the defendant Smellie would contend that the plaintiffs were estopped from denying that the defendant Taylor had such authority by reason of their having handed the said documents and blank transfer to Taylor with authority to raise money thereon and not giving notice to the defendant Smellie that such authority was limited. Further, and in the alternative, the plaintiffs had

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ratified the said dealing of the defendant Taylor with the said documents by receiving on or about August 19 the sum of 50*l.* part of the said advance by cheque of the defendant Smellie in favour of the defendant Taylor and indorsed by him to the plaintiffs with full knowledge of the said facts or without inquiry of either of the defendants as to the same.

The documents relating to the shares which were handed to Taylor by the plaintiffs on July 21, 1910, were (1.) a letter of renunciation by a Mr. Pisau addressed to Marshall (a promoter) and to the company, directing that 500 of the shares coming to him sh uld be allotted direct to the plaintiffs; (2) a letter from the plaintiffs to the secretary to the company directing him to hand the certificate for the shares to Pisau; (3.) a letter from the secretary to the company to the plaintiffs giving the numbers of the shares; and (4.) a letter dated July 21 from the plaintiffs to the secretary to the company authorizing him to hand the documents to bearer.

Scrutton J. held that he was bound by *France* v. *Clark* (1) to hold that the receipt of the blank transfer by the defendant Smellie put him on inquiry as to Taylor's authority, and that the defendant Smellie must be taken to have had notice of the limitation of Taylor's authority; he therefore held that the defendant Smellie must give up the documents to the plaintiffs without repayment by the plaintiffs of the money advanced upon them. He also gave judgment against Taylor.

Smellie appealed.

Schwabe and *Henn Collins*, for the appellant. A person who lends money on documents of title presented by an agent is not bound by a private limitation by the principal of the agent's authority: *Brocklesby* v. *Temperance Permanent Building Society*. (2) The blank transfer is only an intimation that the shares may not stand in the name of the person presenting the authority to receive the documents of title; it is admitted that the defendant Smellie was put upon inquiry as to whether the documents were the property of the person who brought them to him, but he was not put upon inquiry any further. It

(1) 26 Ch. D. 257. (2) [1895 A. C. 173.

is clear that where an owner of property gives all the indicia of title to another person, with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent, who has no notice of the limit: *Rimmer* v. *Webster*. (1) [They also cited *Hooper* v. *Herts*. (2)]

Harmer, for the plaintiffs. It is true that if the intermediary once has authority he becomes an agent, and his principal is estopped from denying that he gave authority to his agent, and *Brocklesby* v. *Temperance Permanent Building Society* (3) shews that, if the agent has the indicia of title coupled with authority to borrow, his principal is bound. But in the present case Taylor never had authority to deal with the shares as he did. An innocent third party is no longer innocent if something has happened to put him on inquiry, and a blank transfer puts him on inquiry. The mere fact of the possession of title deeds in the name of a third party does not shew that the holder is not the true owner; such a state of circumstances might be quite consistent with the ownership being in himself; but the production of a blank transfer is wholly inconsistent with ownership. The case is distinguishable from *Brocklesby* v. *Temperance Permanent Building Society* (3) and *Rimmer* v. *Webster* (1), for those cases dealt with title deeds to real property.

Again, although *Rimmer* v. *Webster* (1) says that, when once it is established that an agent is clothed with the indicia of title and with an intention to deal with the property, the principal is estopped from denying that the agent had full authority to deal with it, that went a step further than *Brocklesby* v. *Temperance Permanent Building Society*. (3) No one who gives his agent authority to deal for him holds him out as his agent for more than he has authorized him to do; e.g., if he gives an agent authority to borrow he does not hold him out as having authority to sell. Even if Taylor had authority to borrow, he never had by holding out authority to do what he did. *Rimmer* v. *Webster* (1), which said that there was no limitation at all on what an agent

(1) [1902] 2 Ch. 163. (2) [1906] 1 Ch. 549.
(3) [1895] A. C. 173.

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entrusted with documents could do, is wrong and should be overruled. [He also cited *Fox* v. *Martin* (1); *Colonial Bank* v. *Cady & Williams* (2); *France* v. *Clark* (3); *Powell* v. *London and Provincial Bank.* (4)]

Schwabe, in reply, referred to *Reid* v. *Rigby & Co.* (5); *Colonial Bank* v. *Cady & Williams* (2); *Watteau* v. *Fenwick.* (6)

Feb. 24. VAUGHAN WILLIAMS L.J. In this case, according to the findings of Scrutton J., Messrs. Fry & Mason were people who were entitled to five hundred shares in the Roumanian Oilfields, Limited. They wanted to borrow money, and they gave to one Taylor an authority to borrow not less than 250*l.* upon documents which represented their right to the shares. "Taylor did not apply that authority properly. He only borrowed 100*l.* and he borrowed it on terms which were to his personal benefit and not to the benefit of his employers, and I find"—this is what Scrutton J. says—"that he concealed from his employers what he was doing; in other words he did not act within his authority. The person from whom he borrowed 100*l.* on the odd terms which appear in the letters, which I do not repeat, was a gentleman at Liverpool named Smellie."

It is convenient here to set out the terms of the letter, the terms of which Scrutton J. does not set out: "2 and 3, Norfolk Street, Strand, London, W.C., August 17th, 1910. W. Smellie, Esq., Liverpool. Dear Mr. Smellie,—I have sold you this day 500 (five hundred) ordinary fully paid shares in the Roumanian Oilfields, transfer with numbers etc. already handed to you for the sum of 100*l.* It is understood and agreed that you will retransfer these shares to me or my nominee immediately on receipt by you of the sum of 100*l.* (one hundred pounds) and one quarter of the ordinary shares in the S. and T. Syndicate: also proceeds due in cash, that is to say 25 per cent., 200*l.* cash profit, which is now being formed for the handling of the Ottoman Oilfields, provided this arrangement is carried through within six months of this date. Yours faithfully, J. Taylor." The

(1) (1895) 64 L. J. (Ch.) 473.
(2) (1890) 15 App. Cas. 267.
(3) 26 Ch. D. 257.
(4) [1893] 2 Ch. 555.
(5) [1894] 2 Q. B. 40.
(6) [1893] 1 Q. B. 346.

authority given by Messrs. Fry & Mason to Taylor was the following: "August 9th, 1910. J. Taylor, Esq., 2 and 3, Norfolk Street, Strand. Dear Sir, The Roumanian Oilfields, Limited. We hereby authorise you to obtain a loan of 250*l.* on the 500 shares in the above company on the best terms you may be able to arrange, but it is understood that any offer of a less sum" —that is a less sum than 250*l.*—"must be submitted to us for confirmation. Yours faithfully, Fry & Mason." Fry & Mason also, on the same date, August 9, 1910, sent a letter to J. Taylor: "Dear Sir,—In consideration of your arranging a loan of 250*l.* (two hundred and fifty pounds) on the security of 500 (five hundred) shares in the Roumanian Oilfields, Limited, we agree to pay you a commission of 25*l.* (twenty-five pounds), and allow you to retain a further 50*l.* as loan to be repaid as and when we may have to repay our share of the loan. Yours faithfully, Fry & Mason." On August 11 Smellie, by cheque to the order of Taylor, paid him 50*l.*, and on August 18, by a cheque to Taylor or order, paid him a further 50*l.*; and on the same day Smellie wrote to Taylor: "Dear Mr. Taylor,—I beg to acknowledge receipt of your letter of the 17th August" (containing the terms as between Smellie and Taylor; well, that is not quite accurate) "and have pleasure in handing you herewith as arranged cheque for further 50*l.* making 100*l.* in all which I have paid you for 500 ordinary fully paid shares in the Roumanian Oilfields, Limited, as per transfer handed to me by your good self. The shares are held by me on the conditions contained in your letter of August 17th, 1910. Yours truly, W. Smellie."

Scrutton J. refused to believe the evidence of Taylor, and had no doubt that the plaintiffs were entitled to all they claimed as against him, but Mr. Harney, counsel for the plaintiffs, only asked for judgment against him for nominal damages, and waived any claim against Taylor for the return of the documents. Scrutton J. then dealt with the argument of Mr. Collins, on behalf of the defendant, based on *Brocklehurst* v. *Temperance Permanent Building Society* (1) and Farwell J.'s judgment in *Ramsay* v. *Hoberts* (2), which prima facie certainly establish that if you entrust a man with the indicia of title, and also give

(1) [1895] A. C. 173. (2) [1902] 2 Ch. 163, at pp. 172, 173.

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actual though limited authority to deal with him, the person who deals with him in good faith and without notice and with ignorance of the limitations is not affected by the limitations.

Scrutton J. accepts this proposition, but nevertheless finds against Mr. Smellie that he is not entitled to hold the documents of title as security for a loan of 100*l.*, or any other sum. The ground upon which Scrutton J. arrived at this conclusion, displacing the prima facie right of Smellie to hold the documents, is thus expressed by him : " Mr. Harney's point is this. The indicia of title in this case were not what one may call perhaps first-class indicia of title; they were rather remote. They were a nomination by the vendors of Fry & Mason as people to whom shares were to be allotted : a statement by the secretary of the company that certain shares numbered with certain numbers were the shares to which the nominees were entitled ; a request by Fry & Mason, the nominees, to the secretary of the company, to hand bearer the certificate for 500 shares and a transfer in blank signed by Fry & Mason with no name of a transferee filled in, which indicia of title of themselves put the man who takes them on inquiry, because if it was intended that the people who deliver the indicia of title should have absolute power to deal with them, his name would have been put in the transfer, and the fact that the transfer was in blank shews that there is some authority other than the one which would be inferred from actual ownership of the documents other than the absolute ownership." Mr. Harney cited *France* v. *Clark* (1) and *Powell* v. *National Provincial Bank* (2) ; and it is on the authority of those cases that Scrutton J. came to the following conclusion : " I am bound, I think, to hold that the presence of the blank transfer in these documents puts the person who takes them on inquiry as to the authority of the person who had it." I think that Scrutton J. was wrong in holding that, on the authority of *France* v. *Clark* (1), which I have just referred to as one of the authorities cited by Mr. Harney, he was bound to hold that the presence of the blank transfer in these

(1) (1883) 22 Ch. D. 830; (1884) 26 Ch. D. 257.

(2) [1893] 1 Ch. 610 ; [1893] 2 Ch. 555.

documents bound him to hold that the person receiving such documents was put on inquiry as to the authority of the person who presented the documents for the purpose of raising a loan.

In the first place, there is this important difference between *France* v. *Clark* (1) and the present case. In *France* v. *Clark* (1), France, the registered holder of shares in a company, deposited the certificates together with a blank transfer with Clark as security for 150*l*., and Clark deposited the certificates and the blank transfer with Quihampton as security for the sum of 250*l*. previously lent to Clark by him. Clark therefore was simply a mortgagee or pledgee, and in no sense an agent of France with limited authority; and there was no need to apply the rule that an owner who gives indicia to an agent and authorizes him to deal with such indicia either for the purpose of raising money or sale, owes a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority. Clark wrongfully pledged or mortgaged to Quihampton documents which he held as security for a loan of 150*l*., as security for a loan of 250*l*. previously advanced by Quihampton to him. There was no intent on the part of France to do anything but create an equitable security in Clark as pledgee or mortgagee for 150*l*. When one deals with transfers of this sort, not of property, but of documents giving a right to registration in the books of the company as the holder of specific shares, the relation of the transferor to the transferee is of essential importance. In my opinion, the mere fact of the transfer being in blank does not put the transferee on inquiry as to the authority of the transferor independently of the relation of the registered owner to the transferee. The case of *Colonial Bank* v. *Cady & Williams* (2) was a case which, so far as the question raised is concerned, has no bearing on the present case, for it turned upon the question as to the position of a transferee under a blank transfer and a power of attorney executed by a registered owner as against the executors of such registered owner. But the observations of Lord Watson and Lord Herschell in the course of their judgments throw a great deal

(1) 22 Ch. D. 830; 26 Ch. D. 257. (2) 15 App. Cas. 267.

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of light on the present case. Lord Herschell says (1): "The evidence of the American lawyers, however, makes it equally clear that such certificates of shares"—that is the blank certificates—"are not in the United States, any more than in England, negotiable instruments. The mere delivery of them with the indorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, is not of itself sufficient to pass the title to them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose. But if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped"—I shall have something to say on the word "estopped" presently—"from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner. As at present advised I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. But this is not the case with which your Lordships have to deal. The transfers in this case were not signed by the registered owner, John Michael Williams, but by his executors. If they had been so signed and delivered by the executors for the purpose of effecting a transfer, I see no reason to doubt that such a delivery would

(1) 15 App. Cas. at p. 285.

have been effectual for that purpose. But they were not. As I have already said, the only object they had in handing them thus signed to the brokers was to complete their title by obtaining registration in their own names. And the question to be determined is whether parting with the possession of the certificates so signed was an act which estops them from setting up their title as against a person who has taken the certificates bona fide, and for value, from the brokers entrusted with them." That is a statement of the law, quite independently of the facts of that case, the decision of which has no application at all to the present case. Now I propose to read a passage from the judgment of Lord Watson, on p. 277: "In so far as the law of America is concerned, your Lordships have the aid of three experts, two of whom were examined by the appellants and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English Court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank,"—of course in this case it was not executed by him, but by his executors—"delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour." And again later, Lord Watson says: "It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner. According to the custom of bankers and stockbrokers, both in this country and America, a certificate, with the indorsed transfer executed in the manner already described, is regarded as being 'in order'; and

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its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner."

I have quoted these passages to shew that the transfer of a blank certificate may, in the case of a mortgage, give a good title if there is an intent to transfer, but the duty of the transferee from an earlier mortgage of such documents cannot of course give a good title, unless he has a good title himself, and Clark could give Quilhampton no such title, when he, as pledgee or mortgagee to secure a loan of 150*l.*, pledged it to Quilhampton for 250*l.*

In the present case Fry & Mason owed a duty to any one to whom their agent, to raise money for them, presented the certificates and blank transfer, to inform the person lending the money of any limitations in the authority of their agent. I think, therefore, that the judgment of Scrutton J. must be reversed and judgment entered for the defendants with costs, on the ground that the plaintiffs are estopped from setting up, as against the transferee, the limitations which they, as between themselves and their agent, thought it right to impose upon the agent. I said I would say a word or two on the word "estopped." It is used in the judgment in the House of Lords by two such great lawyers as Lord Watson and Lord Herschell. They both of them speak of "estoppel." I do not think that it is a happy word to use. It must be remembered what they speak of is estoppel by representation, but when they come to deal with the circumstance which will raise the estoppel they by no means rest the estoppel upon the representations which appear in the blank transfer or the power of attorney. In each case they qualify what they say about the estoppel by introducing the intent of the original transferor. I am not now, of course, dealing with the mortgagee case, but I am dealing with the case of the agent. What really creates the estoppel, as it is called, is the relation of the transferor to the transferee—the relation of principal and agent. When you are dealing with the estoppel by representation, it is plain that the noble Lords did not mean that any estoppel arises on the representation to be found upon the face of the documents. What they mean is this. You must first find out the relation of the transferor to the first transferee, and find out first if he is a mortgagee,—I may pass by that question—and

secondly, if you find that he is an agent, that casts, as I have said in the judgment I have just read, upon the principal, the transferor, the duty of communicating to the persons to whom his duty goes, by his authority, the limitations of the authority as between the principal and the agent. Since the case has been argued, I ventured to mention this difficulty to Kennedy L.J., and Kennedy L.J. then suggested to me a more accurate description of what has been called estoppel than the word "estoppel" conveys. It is really an instance of the application of the rule that when one of two innocent persons must suffer, the person who rendered it possible for the wrong-doer to do the wrong, by reason of the trust he reposed in the wrong-doer, should suffer rather than the person who suffers from the agent having that opportunity. I daresay that I ought not to doubt that the word "estoppel" does cover the case—estoppel by representation. But it occurs to my mind that it is not, strictly speaking, estoppel by representation. It is an application of this rule that I have just mentioned, where one of two innocent persons must suffer, the person who, by trusting the agent, enables the fraud, is to suffer rather than the person who has no such relation to the agent. See Lord Macnaghten's judgment in *Brocklesby* v. *Temperance Permanent Building Society*. (1)

FARWELL L.J. On August 9, 1910, the plaintiffs gave a letter of authority to the defendant Taylor, which my Lord has already read. On August 17, 1910, the defendant Taylor borrowed 100*l.* from the defendant Smellie, and handed to him the certificates for the said shares and a blank transfer thereof, executed by the plaintiffs, at the same time representing to Smellie that he, Taylor, had control of them. Smellie believed him, and advanced his money on the faith of such representation, believing him to have full authority to deal with the shares. On August 18 Smellie gave Taylor a cheque for 50*l.*, which was indorsed by Taylor to the plaintiffs and paid into the credit of their account at a bank. Taylor told them that it was on account of the loan. On these facts the case is, in my opinion, indistinguishable from *Brocklesby's Case* (1), the only difference being

(1) [1899] A. C. 173.

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that in that case the fraudulent agent exceeded the limit put on his borrowing powers: in the present case he has borrowed less than the amount, in disregard of the directions not to do so. The principle on which *Brocklesby's Case* (1) is founded is stated with absolute lucidity by Lord Herschell, Lord Watson, and Lord Macnaghten, and I have already adopted and applied it, in *Rimmer* v. *Webster* (2), to a case of a mortgage by an agent with power to sell. I will only say that I desire to treat my judgment there as repeated here, and am of opinion that it is correct. Scrutton J. has attempted to distinguish this case thus. In *Brocklesby's Case* (1) the property charged was real estate vested in the appellant; the agent to borrow took the title deeds thereof, which shewed no title in himself, and raised money by deposit thereof in excess of the limit allowed him. In the present case the agent to borrow took the certificates and a blank transfer, shewing no title in himself, and raised money in disregard of the condition limiting his authority. Scrutton J. calls the certificates and blank transfer "not first-class indicia of title," "rather remote," and says that they put the lender on inquiry. I can only say that certificates and a blank transfer are in everyday use as securities for raising money, and that every man who lends money to A. on documents which shew a title in B. is of course put on inquiry. This does not mean that he must refuse to deal with the agent at all but must refer to the principal, but that he must make such inquiry as is reasonable under the circumstances. If he is foolish enough to lend to A. without inquiry, and A. has no right or authority to deal with the documents, he loses his money, and it is perfectly immaterial whether the security is a deposit of title deeds to real estate or certificates of shares with a blank transfer. Such a question as arises in the present case can only arise when the owner of the property has authorized such a dealing with the property as is corroborated by the possession of the indicia of title. If no authority at all has in fact been given it is quite immaterial whether the lender inquires and is given an untrue answer or does not inquire at all; in either case he loses his money. But if the owner has in fact given the borrower authority to deal with the property by way of

(1) [1895] A. C. 173. (2) [1902] 2 Ch. 163.

loan or by way of sale, and has entrusted him with the indicia of title, enabling him so to deal, then the owner cannot be heard to say that there is any limit on the authority so given. If the indicia of title are apparently co-extensive with the authority claimed there is nothing to suggest any limit. The estoppel arises out of the conduct of the owner of the property. Estoppel is merely a rule of evidence which prevents the person estopped from giving certain facts in evidence. If A.'s conduct amounts to an invitation to B. to advance money to C. without limit on the title deeds of A.'s property, he cannot be heard to say that he had imposed on C. a limit, any more than if he had written or said to B. that he had given C. authority to borrow money and had not mentioned any limit. If he has simply deposited his deeds with C., such deposit involves no such representation, and there is therefore no such estoppel. In speaking of estoppel, I am referring to the doctrine of estoppel by representation which Lord Macnaghten, in *Whitechurch* v. *Cavanagh* (1), says "is a very old head of equity." (See *Low* v. *Bouverie* (2).) It is sometimes called equitable estoppel or a rule of equity, and has been expressed in some of the cases as the rule which compels a man to make good his representations of fact, in reliance on which the person to whom they have been made for the purpose of inducing him to act on them has so acted. Indeed equitable estoppel is the only way in which this doctrine of making good representations has survived the decision in *Derry* v. *Peek*. (3) The circumstances must necessarily be such as to shew a duty to some one to disclose fully on the person making the representation, but it is not a question of negligence in the sense that an action for damages would lie at common law, and no bill in equity would ever have been filed for damages. But if there is no duty to disclose there is no equity to remedy its non-performance. The man who simply deposits his deeds by way of equitable mortgage incurs no duty to third persons, because his deposit is no representation of anything beyond the existence of an equitable mortgage, but if he deposits them for the purpose of enabling the depositee to

(1) [1902] A. C. 117, at p. 130. (2) [1891] 3 Ch. 82.
(3) (1889) 14 App. Cas. 337.

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deal with them as apparent owner, he must make good that representation, although he may, as between himself and the depositor, have put some limit on the latter's apparent full dominion.

I have already explained this to the best of my ability in *Rimmer* v. *Webster* (1), but I wish to emphasize the statement that the indicia of title are the true, and indeed the only possible, limit. If A., with authority to borrow only, and that up to a limited amount, brings the title deeds of B.'s real estate to C., supporting his statement that he has power to borrow thereon without limit by the production of the deeds, B. cannot dispute the extent of the authority, because he has in fact given A. authority, and has enabled him to shew an apparent authority without limit, and because it is common usage to raise money by deposit of deeds. But it is not common usage to sell real estate in such a way. If C. claimed to have purchased such real estate the utmost that he could recover would be repayment of the money advanced by him, and interest. The case becomes quite clear if we consider the procedure that would have been adopted before the Common Law Procedure Acts created equitable pleas. B. would have sued in detinue for his deeds. Thereupon C. would have filed his bill to restrain such action, and for specific performance, and to have the legal estate vested in him. But the Court would not have assisted him, except on the terms of his doing equity, and would have refused him relief unless he offered to give up the deeds on payment of principal, interest, and costs. But the case is different when the security is certificates of shares and a blank transfer. It is common usage nowadays, at any rate with new companies, to deal with such shares by handing over certificates and blank transfers for the purpose of selling as well as of borrowing money; and the blank transfer, if duly filled up (*France* v. *Clark* (2)), and followed by registration, gives the legal title, so that equity is not called on to interfere in such a case. I do not, as at present advised, see any ground on which the purchaser could be deprived of his legal title, although it might be different if the whole matter rested in fieri. Several cases have been cited to us, none of which have any

(1) [1902] 2 Ch. at pp. 169–173. (2) 26 Ch. D. 257.

bearing on the present case, because in all of them the question was whether any authority at all was given—not whether a man who had given some authority and the indicia of title could set up against an innocent lender the limitations that he had placed on such authority. In *France* v. *Clark* (1) the registered holders of the shares deposited the certificates and a blank transfer thereof duly signed as security for 150*l*. It was a simple case of an equitable charge of shares. Clark did not fill in his own name and get it inserted on the register of the company as he might have done. If he had done so, a purchaser from him would, on registering his transfer, have got a perfect title. But he created a further equitable interest by depositing the certificates and blank transfer with Q. to secure 250*l*. Q. then filled up the blank transfer to himself, and it was held that he had no authority to do so. The question of authority by holding out was never suggested, because it was obvious that a man who creates an equitable charge on his shares by such deposit and blank transfer holds out nothing. He gives the mortgagee an equitable title, with power to complete his legal title, and to deal with that title when completed; but he gives him no authority or right over any equitable interest, except to the extent of his own mortgage. The possession of the indicia of title is consistent with the equitable mortgage created in accordance with common usage, and there is nothing else. *Fox* v. *Martin* (2) is to the same effect. There was no authority to borrow at all, and therefore no question of estoppel in respect of the limitation of such authority. The owners of the shares dealt with them in the ordinary way of business. (See *Rimmer* v. *Webster* (3).) The case of *Colonial Bank* v. *Cady & Williams* (4) was referred to; but the question there was whether the execution by the executors of a transfer in blank of shares in an American railway operated to pass the full legal and equitable title in the shares. (5) It was held that if the owner had himself been the transferor it would have done so, for the reason stated by Lord Halsbury at p. 274: "But undoubtedly a document may by usage become so well understood in a particular sense that a

(1) 26 Ch. D. 257.
(2) 64 L. J. (Ch.) 473.
(3) [1902] 2 Ch. at p. 172.
(4) 15 App. Cas. 267.
(5) See ibid. at pp. 277, 278.

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person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it"; but that it was different in the case of his executors, because of the proved usage that executors executed transfers in that way for the purpose of getting themselves registered as owners, and not only for the purpose of transferring to third persons. It was not a question of implied authority, but of actual title, although the dicta in the case are strongly in favour of the view that I have expressed. (1)

I am therefore of opinion that Scrutton J.'s judgment cannot be supported. I must add that, even if he had been right on the main question, his refusal to order repayment of the defendant's 50*l.*, which actually went into the plaintiffs' banking account, is contrary to every principle of equity. The plaintiffs had had the money, and were told that it was on account of the loan. It was paid by the defendant's own cheque to them, and they indorsed the cheque; to allow them to retain this is quite impossible. The defendant, by his defence, offers to give up the documents of title on payment of the 100*l.* advanced and his costs, and asks for no interest. It is therefore unnecessary to consider whether he would have been bound to concede so much, and I will only add that, in my opinion, the document of August 17 was clearly a mortgage and not a sale, and that the provision for handing over other shares was a clog on the equity of redemption, and could not have been enforced. The appeal should be allowed, and the action dismissed with costs here and below.

KENNEDY L.J. I am of opinion that the judgment of Scrutton J. in this case must be reversed, and the appeal allowed. The reasoning of the decision of the House of Lords in *Brocklesby* v. *Temperance Permanent Building Society* (2) (which is binding upon us) and the decision of Farwell J. in *Rimmer* v. *Webster* (3) appear to me to govern this case. I may add, as the correctness of the last-mentioned decision was questioned in the argument of the respondent's counsel, that I

(1) See especially Lord Herschell's judgment at p. 285, and Lord Watson's judgment at p. 278.

(2) [1895] A. C. 173.

(3) [1902] 2 Ch. at pp. 172, 173.

entirely concur in the statement of the law as laid down by my brother Farwell in the last-mentioned case. The reason why Scrutton J., as I understand his judgment, did not treat the decisions to which I have referred as applicable was that he thought that the present case was differentiated by the fact that one of the documents deposited with the appellant Smellie was a blank transfer, and it was held by the Court of Appeal in *France* v. *Clark* (1) that a person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blank, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument. Scrutton J. deduced from this proposition that the presence in the present case of a blank transfer put Mr. Smellie on inquiry as to the authority which Taylor had, and that Mr. Smellie, not having inquired, was just in the same position as if in fact he had notice of Taylor's limited authority. I cannot adopt this view. It leaves out of sight the all-important fact of the intention and purpose of the plaintiffs in placing Taylor in possession of the documents. The doctrine laid down in *France* v. *Clark* (1) has, it seems to me, no place where the conflicting rights are the rights on the one hand of an owner who has entrusted the documents of title, whether title deeds of real property, or, as in the present case, documents representing an interest in shares of a company, to his agent with authority to dispose of them, whether by pledge or by sale for the purpose of raising money on them, and the right on the other hand of the pledgee or purchaser who, acting honestly and being in fact ignorant of any limitation of the authority, has given to the agent, apparently clothed with the right of disposition, valuable consideration for the said title deeds or documents. The owner's own act in such a case in authorizing the agent to deal with third persons by obtaining money from them by means of or upon the title deeds or other documents creates, as against the owner, an equitable estoppel, as it has been called, the result of which is that, as Lord Herschell says, referring to the judgment of the Lord Chancellor in *Perry-Herrick* v. *Attwood* (2), the owner of

(1) 26 Ch. D. 257. (2) (1857) 2 De G. & J. 21.

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the deeds or other documents cannot take advantage of any limitation in point of amount which he placed upon the authority to raise money as against the lender who had no notice of it. One of two innocent persons has to suffer by the misconduct of the agent; and the burden of loss ought in equity to fall upon him who intended his agent to obtain money from the other party, and clothed his agent with an apparently unqualified authority to obtain the documents for that purpose. In *France* v. *Clark* (1) no such equitable estoppel could arise. There was no authority given by the plaintiff to the depositee of the certificates and blank transfers of shares in a company to deal with those shares in any way or to create rights in other persons in regard to them, and therefore, according to legal principles which appear to be well established, he who took these documents from the agent could take thereby no better title, either in law or in equity, than the agent himself had, and could not better it as against the owner, by inserting his own name in the blank transfer. In such a case the essential fact of the owner's authority to the agent to raise money upon the documents which gave rise to the equitable estoppel in *Brocklesby* v. *Temperance Permanent Building Society* (2) and in *Rimmer* v. *Webster* (3) and gives rise to it in the present case does not exist. The case of *Colonial Bank* v. *Cady & Williams* (4), which was cited in the course of the argument in this Court, appears to me in no way to help the plaintiffs. As in *France* v. *Clark* (1), the agent, a broker, who had wrongfully deposited the plaintiff's documents with the appellant bank as security for advances to himself, had no authority whatever from the plaintiffs to raise money upon the documents; and the only question was whether or not, by means of the condition in which the particular documents in that case, which were somewhat peculiar documents, were, when entrusted by the plaintiff to the agent, it estopped the plaintiffs from setting up their title as against the bank—a question which the House of Lords decided against the bank on the particular facts of that case. I agree that this appeal must be allowed and judgment entered for the defendants.

(1) 26 Ch. D. 257.
(2) [1895] A. C. 173.
(3) [1902] 2 Ch. 163.
(4) 15 App. Cas. 267.

VAUGHAN WILLIAMS L.J. The length of the judgment which I delivered made me forget two things I meant to say. One was this. There were two cases cited by Mr. Harney. I have dealt with *France* v. *Clark* (1), but he also cited *Pocock* v. *London and Provincial Bank* (2). I do not think it militates in any way against my judgment in this case. I wanted also to say, as to the Irish case of *Hone* v. *Boyle* (3), that the judgments of FitzGibbon L.J. and also of Lord Ashbourne, the Lord Chancellor of Ireland, set out the law in the same way as I have put it in this judgment, with respect to the effect of a blank transfer.

Appeal allowed.

Solicitors for appellant: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for respondents: *Weldon & Edwards.*

W. J. B.

PITTS *v.* PLYMOUTH CORPORATION.

1912 *Feb.* 23.

Water—Supply—Charges—Dwelling-house outside a Borough but within the Limits of Special Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 1, 35, 53—*Plymouth Corporation Water and Markets Act*, 1867 (30 & 31 *Vict. c. cxxciii.*), *ss.* 2, 14, 15, 22.

A special Water Act relating to the borough of Plymouth enacted by s. 14 that the corporation should provide water to the inhabitants within the borough, and by s. 15 that if the corporation thought fit they might supply water to persons within the water limits beyond the borough upon agreed terms, and by s. 22 that at the request of, amongst others, "any person who under this Act is entitled to demand a supply of water" the corporation should supply water at certain specified rates.

By s. 35 of the Waterworks Clauses Act, 1847 (which was incorporated with the special Act except where expressly excepted or varied by that Act), the undertakers shall provide a supply of water sufficient for all the inhabitants of the district within the limits of the special Act, and by s. 53 the occupier of a dwelling-house within those limits shall be "entitled to demand and receive from the undertakers" a

(1) 26 Ch. D. 257. (2) [1893] 1 Ch. 610.
(3) (1891) 27 L. R. Ir. 137.

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supply of water upon paying the rate payable according to the provisions of that Act and the special Act.

The plaintiff was the occupier of a dwelling-house situated within the water limits of the special Act but outside the boundary of the borough of Plymouth:—

Held, that the effect of the two Acts when read together was that s. 22 of the special Act did not apply to the plaintiff, and that he was only entitled to be supplied with water upon agreed terms under s. 15 of the special Act.

APPEAL from the county court of Devonshire holden at Plymouth.

The action was brought to recover the sum of 1*l.* 8*s.* 6*d.* paid by the plaintiff to the defendants, the Corporation of Plymouth, under protest in respect of water for domestic purposes supplied in one year by the defendants to the plaintiff's dwelling-house. The plaintiff's house was situate in the parish of Buckland Monachorum, which is outside the boundaries of the borough of Plymouth but is within the limits of the Plymouth Corporation Water and Markets Act, 1867 (1), with respect to the supply of water by the defendants. For the year in question, the plaintiff was charged by the defendants for the supply of water to his dwelling-house the sum of 2*l.* 12*s.* 6*d.*, being 7½ per cent. on the gross rental of 35*l.* The same sum had been demanded of and paid by the plaintiff without protest in previous years, but on the occasion in question the plaintiff raised the point that, being the occupier of a dwelling-house within the limits of the defendants' special Act of 1867, and therefore, as the plaintiff contended, entitled under s. 53 of the Waterworks Clauses Act, 1847, to demand and receive a sufficient supply of water for his domestic purposes, he was under s. 22 of the Act of 1867 only liable to pay 1*l.* 4*s.*, that being the rate specified in that section in respect of a house of which the rent was 35*l.* The plaintiff accordingly paid the 2*l.* 12*s.* 6*d.* under protest and claimed in this action 1*l.* 8*s.* 6*d.*, the difference between the two sums.

The county court judge gave judgment for the defendants, holding that the provision in s. 1 of the Waterworks Clauses Act, 1847, "save so far as they shall be expressly varied or excepted by any such Act," together with s. 15 of the Act of 1867, operated

(1) See note on p. 306, post.

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to prevent the plaintiff from being within the provisions of, or availing himself of, the benefit of s. 53 of the Act of 1847, and to relieve the defendants from the obligation defined in s. 35 of that Act, and that the scale set forth in s. 22 of the Act of 1867 was not applicable to the plaintiff's dwelling-house. The county court judge further held that, although there was no express agreement between the parties, the fact of previous demands and payments of 7½ per cent. upon the rent was evidence from which he could infer an agreement within s. 15 of the Act of 1867.

The plaintiff appealed.

The Plaintiff in person. By s. 1 of the Waterworks Clauses Act, 1847, which is incorporated with the defendants' special Act of 1867, all the clauses of the Act of 1847 shall apply to the undertaking authorized by the special Act "save so far as they shall be expressly varied or excepted" by the special Act. Under s. 35 of the Act of 1847 the defendants have to provide a water supply sufficient for the inhabitants of the district within the limits of the special Act, and under s. 53 every occupier of a dwelling-house within those limits is "entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes." The plaintiff's dwelling-house is situate within the limits of the special Act, and he is therefore by reason of s. 53 a person entitled to demand a supply of water, and s. 22 of the special Act of 1867 provides in terms that "any person who under this Act is entitled to demand a supply of water for domestic purposes" shall be supplied with water at the rate specified in that section. The plaintiff was therefore only liable to pay 1*l.* 4*s.* The county court judge was of opinion that s. 15 of the special Act applied to this case, but ss. 35 and 53 of the Act of 1847 are not expressly varied or excepted by any provision in the Act of 1867, and the plaintiff cannot by s. 15 be deprived of the rights conferred upon him by those sections. Sect. 15 has no application to this case, its object being to enable the corporation and a person desiring a water supply to agree upon terms of remuneration. If the county court judge's judgment stands, the defendants will be able under s. 15 to refuse to supply water for domestic purposes to a dwelling-house outside the borough

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but within the limits of the Act of 1867 except upon such terms as the defendants choose to impose. [He referred to *Dudley Gas Co.* v. *Warmington*. (1)]

J. A. Hawke, for the defendants, was not called upon to argue.

DARLING J. This is an appeal from the judgment of the county court judge of Devonshire sitting at Plymouth, who held that the plaintiff was not entitled to demand a supply of water for domestic purposes for his dwelling-house at a rate on the yearly value of the house according to the scale set out in s. 22 of the Plymouth Corporation Water and Markets Act, 1867. The plaintiff contends that by virtue of s. 53 of the Waterworks Clauses Act, 1847, he is a person entitled to demand a supply of water, and that he is, therefore, within s. 22 of the special Act and is only bound to pay for the water at the rate specified in s. 22. In my opinion the plaintiff's contention is wrong. He has argued that the special Act has not varied the Act of 1847. I do not think it is necessary to say that it has varied it, but the two Acts have to be read together, and s. 53 of the Act of 1847 says in terms that the water rate is to be paid "according to the provisions of this and the special Act." We must therefore read the provisions of the two Acts as if they were one Act, and we must consider not only the provisions of s. 22 of the special Act, but also the other material sections, namely, ss. 14 and 15. Under s. 14 the defendants have to supply water to the inhabitants of the borough "at the rates in that behalf provided by this Act," and by s. 15 the defendants "if and when they think fit" may supply "any persons within the water limits beyond the borough with water" for such remuneration and upon such terms as may be agreed upon. The plaintiff is a person who lives within the water limits beyond the borough, and therefore, in my opinion, it is s. 15, and not s. 22, which applies to his case. Further it is in my opinion not an unreasonable thing that he should not be entitled to a water supply at the same rate as the inhabitants of the borough, to whose houses the water can obviously be supplied at a less cost than to an isolated house situated in a country village outside

(1) (1881) 50 L. J. (M.C.) 69.

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Darling J.

the borough. What the plaintiff is really seeking to do is to read s. 22 of the special Act into the Act of 1847 because it would give him a water supply at a cheaper rate, and to ignore s. 15, which does not enable him to get his water at the cheaper rate, but there is no reason why s. 22 should be, and s. 15 should not be, read with the Act of 1847, and, as I have said, it is s. 15 and not s. 22 which applies to the plaintiff. I am therefore of opinion that the county court judge was right in holding that the effect of the provisions of the two Acts when read together is that the defendants are not bound to supply the plaintiff with water at the rate provided by s. 22 of the special Act, but that they are bound to supply it under s. 15 upon agreed terms. This appeal must therefore be dismissed.

Bucknill J. I agree. Unless there has been an express variation or exception of the clauses of the Act of 1847 in the special Act of 1867, ss. 35 and 53 of the Act of 1847 would apply, and the question therefore is whether the Act of 1847 is varied or excepted by s. 15 of the special Act. It is important first to refer to s. 14 of the special Act, which renders it obligatory upon the defendants to supply water to the inhabitants of the borough; in that case the rates to be charged will be the rates specified in the special Act. Then s. 15 deals with the case of persons who do not reside within the borough but who are within the water limits of the special Act. In their case the supply of water is to be at the option of the defendants and at rates to be agreed between the defendants and the person to whom the water is supplied. That is, in my opinion, a very important provision from the point of view of the defendants, for it is only right and just that before deciding to supply persons outside the borough they should have regard to the obligatory supply which under s. 14 they are bound to afford to persons living within the borough. Therefore the supply under s. 15 is not made obligatory but at the option of the defendants, and payment is not to be, as in the case of s. 14, at the rates provided by the special Act, but upon such terms as are agreed upon between the corporation and the person desiring the supply. The plaintiff's dwelling-house is not situated within

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the borough and therefore he does not come within s. 14, but as it is within the water limits he comes within s. 15 and is only entitled to be supplied with water if the defendants think fit to supply him, and if they do supply him, as in fact they do, then he is to pay for the water, not according to the scale in s. 22, but at an agreed rate, and to this extent the effect of s. 15 of the special Act is in my opinion to vary or except the provisions of the Act of 1847. The county court judge has found upon evidence that there was an agreement between the parties for payment at the rate demanded by the defendants, and in my opinion his decision upon the construction of the two Acts was perfectly right, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *C. R. Serpell, Plymouth.*
Solicitor for defendants: *J. H. Ellis, Town Clerk, Plymouth.*

NOTE.—Plymouth Corporation Water and Markets Act, 1867 (30 & 31 Vict. c. cxxviii.), s. 2: " . . . . 'The Waterworks Clauses Acts, 1847 and 1863,' are (except where expressly excepted or varied by this Act) incorporated with and are part of this Act."

Sect. 14. "The corporation by means of the waterworks, and at the rates in that behalf provided by this Act, shall supply the inhabitants of any street within the borough of Plymouth in which any main or service pipe of the corporation from time to time is laid with water for domestic purposes . . . . "

Sect. 15. "The corporation, if and when they think fit and by means of waterworks, from time to time may supply any persons within the water limits beyond the borough with water for domestic purposes, ... for such remuneration and upon such terms and conditions as are agreed on between the corporation and the persons desiring the supply."

Sect. 22. "From and after Midsummer Day, one thousand eight hundred and sixty-eight, the corporation shall, at the request of the owner or occupier of any dwelling-house, or part of a dwelling-house occupied as a separate tenement or dwelling, in any street within the borough of Plymouth in which any main or service pipe of the corporation from time to time is laid, or of any person who under this Act is entitled to demand a supply of water for domestic purposes, furnish to the owner, occupier, or other person, by means, of communication pipes, and other necessary and proper apparatus to be provided, laid down, and maintained at the cost of the person having the supply a supply of water sufficient for his domestic purposes at a rate on the yearly

value of the dwelling-house or part of a dwelling-house not exceeding the rate following; (that is to say)

. . . . .

where the yearly value exceeds thirty pounds and does not exceed forty pounds, twenty-four shillings."

Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17):

Sect. 1. " . . . . This Act shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith, and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act."

Sect. 35. "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water rate for the same; . . . . and the undertakers shall cause pipes to be laid down and water to be brought to every part of the town or district within the limits of the special Act where unto they shall be required by so many owners or occupiers of houses in that part of the town or district, as that the aggregate amount of water rate payable by them annually at the rates specified in the special Act shall be not less than one-tenth part of the expense of providing and laying down such pipes; provided that no such requisition shall be binding on the undertakers unless such owners or occupiers shall severally execute an agreement binding themselves to take such supply of water for three successive years at least."

Sect. 53. "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has had such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

F. O. R.

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June 21.

HOUGHTON *v.* PILKINGTON.

Master and Servant—Implied Authority of Servant—Emergency—Negligence of Servant—Liability of Master.

The plaintiff at the request of a servant of the defendant got into the defendant's cart, which was then in the charge of the servant, in order to render assistance to another servant of the defendant who had been rendered unconscious by an accident. The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart in causing the horse to start. In an action against the defendant for damages for the injuries sustained by the plaintiff:—

Held, that the existence of an emergency gave no implied authority to the servant to invite the plaintiff into the cart, and that the defendant was not liable to the plaintiff.

Cox v. *Midland Counties Ry. Co.* (1849) 3 Ex. 268, followed.

Appeal from the county court of Lancashire holden at Chorley.

The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of one Heaps, the defendant's servant. The facts as found by the county court judge were as follows. The defendant was the proprietor of a milk business. On the day in question Heaps was driving the defendant's milk float on his round for the purpose of delivering milk to the defendant's customers. Heaps was accompanied on the round by a boy named Hogarth, who was also in the defendant's service. In the course of the round Hogarth fell out of the float and lay unconscious in the road. The plaintiff went to the assistance of Heaps, who was attending to the boy, and helped him to place the boy in the float. She said to Heaps, "Shall I help you to take the boy home?" Heaps replied, "You can, if you will get in." The plaintiff thereupon got into the float. Heaps negligently started the horse before the plaintiff was settled in a safe position, causing the plaintiff to fall backwards out of the float, whereby she sustained the injuries complained of.

The county court judge held that "the plaintiff was something more in law than a volunteer; she was invited (or under the circumstances impliedly invited) into the defendant's float by Heaps at a moment which constituted an emergency; there was an obligation upon the defendant's servant to secure assistance

on behalf of his master; the plaintiff was entitled to care on the part of the defendant's servant, and through breach of that care and duty she has suffered damage."

The county court judge gave judgment for the plaintiff for 30*l*.

The defendant appealed.

Eastham, for the defendant. There was no evidence on which the county court judge could find as a fact that the plaintiff's injuries were caused by any act of negligence on the part of the defendant's servant. Assuming that there was some evidence of negligence, the defendant is in the circumstances not liable for his servant's negligence. The defendant owed no duty to the plaintiff. She was in the position of a volunteer, and a master is not liable to a person who while voluntarily assisting his servant in his work is injured by the servant's negligence: *Degg* v. *Midland Ry. Co.* (1); *Potter* v. *Faulkner* (2); *Bass* v. *Hendon Urban District Council*. (3) The county court judge was of opinion that the existence of an emergency gave the defendant's servant an implied authority to invite the plaintiff to get into the cart for the purpose of rendering assistance, but the authorities shew that this view is erroneous. In *Cox* v. *Midland Counties Ry. Co.* (4) it was held that a stationmaster had no implied authority to bind the railway company by a contract for surgical attendance to a person injured in a railway accident. The decision in *Hawtayne* v. *Bourne* (5) was to the same effect.

Compton-Smith, for the plaintiff. There was evidence to support the county court judge's finding on both points. Whether the defendant's servant had implied authority to obtain the assistance of the plaintiff so as to make the defendant liable for injuries caused to the plaintiff by the servant's negligence is a question of fact depending upon the position of the servant and the particular circumstances existing at the time. The plaintiff was not a mere volunteer like the plaintiffs in *Degg* v. *Midland Ry. Co.* (1) and *Bass* v. *Hendon Urban District Council* (3), who had no sort of interest in the matter with which they interfered.

(1) (1857) 1 H. & N. 773.
(2) (1861) 1 B. & S. 800.
(3) (1912) 28 Times L. R. 317.
(4) 3 Ex. 268.
(5) (1841) 7 M. & W. 595.

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Holmes v. *North Eastern Ry. Co.* (1) and *Wright* v. *London and North Western Ry. Co.* (2) are examples of cases where employers have been held liable to a stranger who has been injured while assisting the employers' servants. These cases shew that each case must depend upon its own facts, and therefore the present case cannot be treated as being concluded by *Cox* v. *Midland Counties Ry. Co.* (3), the facts of which were entirely different from those of the present case. [He also referred to *Cleveland* v. *Spier* (4) and *Walker* v. *Great Western Ry. Co.* (5)]

BRAY J. This case raises a point of some importance. It is an action for damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant's servant. The facts are as follows. The defendant had a milk walk and he sent a man named Heaps, who had been in his employment for some years, in charge of a horse and cart for the purpose of delivering milk to the defendant's customers. Heaps was accompanied by a boy who was also in the defendant's service. In the course of the round the boy fell out of the cart into the road and was rendered unconscious. The plaintiff very kindly and properly stepped forward in order to render assistance. In giving evidence at the trial she said that she asked Heaps if she should help him to take the boy home, and that Heaps replied "You can, if you will get in." The plaintiff then got into the cart, and while she was in an insecure position, Heaps negligently, as the county court judge has found, caused or permitted the horse to start, and in consequence the plaintiff fell out of the cart and was injured.

In order to make the defendant liable to the plaintiff for the negligence of Heaps the plaintiff must prove, first, that the defendant owed her some duty, and, secondly, that there was a breach of that duty. The argument has mainly been directed to the question whether there was any duty owed by the defendant to the plaintiff that Heaps should exercise reasonable care as regards the plaintiff when she

(1) (1869) L. R. 4 Ex. 254; (1871) 6 Ex. 123.
(2) (1876) 1 Q. B. D. 252.
(3) 3 Ex. 268.
(4) (1864) 16 C. B. (N.S.) 399.
(5) (1867) L. R. 2 Ex. 228.

was in the cart. With regard to that the county court judge said in his judgment: "The plaintiff was something more in law than a volunteer; she was invited (or under the circumstances impliedly invited) into the defendant's float by his servant, Heaps, at a moment which constituted an emergency. There was an obligation upon the defendant's servant to secure assistance on behalf of his master. The plaintiff was entitled to care on the part of the defendant's servant, Heaps, and through breach of that care and duty she has suffered damage." Thus the county court judge bases the duty on this, that there was an obligation on the defendant's servant in a case of emergency to procure assistance on behalf of the defendant. The question is, Did any duty in law arise from these circumstances? One must see whether Heaps had any authority to invite the plaintiff into the cart. If there was authority, how was it obtained? Heaps had no express authority from the defendant, and it was not in the ordinary course of his duty, to invite people to get into the cart, and therefore if he had authority at all it must be on the ground that the law implies such authority from the nature of the emergency which arose. That question was considered in *Cox* v. *Midland Counties Ry. Co.* (1) In that case a man met with an accident from the moving of a truck on the defendants' railway. A stationmaster in the service of the defendants called in the plaintiff, who was a surgeon, in order that he might perform the operation of amputation on the injured man. The plaintiff performed the operation and sued the railway company for his fees. The question was whether the railway company were bound by the act of their servant in employing the plaintiff, and it was contended for the plaintiff that the company were bound because the stationmaster had authority to act on behalf of the company in a case of emergency. Parke B. in delivering the judgment of the Court said (2): "It is not easy to decide whether unforeseen accidents would occur more frequently in the carriage of passengers by locomotive power on railroads, or in carrying the like number by coach on ordinary roads. Certainly, there is no such difference as to make the duties of an engine driver and a coachman different, as to the power of making such contracts as that in question:

(1) 3 Ex. 268. (2) 3 Ex. at p. 277.

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Bray J.

nor the duties of porters, clerks, or other servants connected with the conveying department. Could it be maintained that a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horse-keeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power." The only distinction between that case and this one is that there the servant was seeking to bind his master by a contract to pay for the services of a third person, whereas here it is said that the invitation of the servant to the plaintiff to enter the master's cart imposes an obligation on the master, but in both cases the fact of there being an emergency is relied on as imposing upon the master an obligation, and if in *Cox* v. *Midland Counties Ry. Co.* (1) the existence of the emergency did not give the stationmaster an implied authority to employ the surgeon, so in the present case it seems to me that the emergency did not give the servant authority to invite a stranger into the cart and by so doing impose an obligation on his master to be liable to the stranger for the servant's negligence in driving the cart.

We have been referred to the case of *Wright* v. *London and North Western Ry. Co.* (2), where the plaintiff, who had gone to the defendants' station to receive a heifer, with the consent of the stationmaster assisted in shunting the horse-box containing the heifer, and while so assisting was injured by the negligence of the defendants' servants. The contention of the defendants was that the plaintiff was a mere volunteer, and that, according to the principle laid down in *Degg* v. *Midland Ry. Co.* (3) and *Potter* v. *Faulkner* (4), the defendants were therefore not liable

(1) 3 Ex. 268.
(2) 1 Q. B. D. 252.
(3) 1 H. & N. 773.
(4) 1 B. & S. 800.

for the negligence of their servants. The Court held, however, that the case was not governed by *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner* (2), but by *Holmes* v. *North Eastern Ry. Co.* (3), where the facts were very similar, and that the plaintiff was not a mere licensee or volunteer, but a person who was on the premises of the railway company by invitation for the common purpose of both parties, and that there was therefore a duty on the railway company to take reasonable care that the plaintiff was not injured while on their premises, and that the railway company were not relieved from that duty merely because the plaintiff when injured was assisting the servants of the company. On the other hand in *Degg* v. *Midland Ry. Co.* (1) the plaintiff was voluntarily assisting the defendants' servant in his work, and it was held that the defendants were under no greater duty to the plaintiff than to their own servants and were consequently not liable to the plaintiff for injuries caused by the negligence of one of the defendants' servants. The decision in *Potter* v. *Faulkner* (2) was to the same effect. I do not think it is necessary to decide whether the plaintiff in the present case can be said to have been in the position of a fellow servant with the driver of the cart, and I doubt whether the cases as to volunteers are really in point. In my view the case is governed by the decision in *Cox* v. *Midland Counties Ry. Co.* (4), which shews that the existence of the emergency did not confer upon the driver of the cart authority to invite the plaintiff into the cart, or to impose any duty on the defendant towards her.

The appeal must therefore be allowed and judgment entered for the defendant, and in these circumstances it becomes unnecessary to consider whether there was any evidence of negligence on the part of the defendant's servant.

BANKES J. I agree. The county court judge has said that he considered there was an obligation on the defendant's servant to secure assistance on behalf of his master. If the county court judge meant a legal obligation I do not agree with him, but reading the whole of the judgment I understand his view to have been

(1) 1 H. & N. 773.
(2) 1 B. & S. 800.
(3) L. R. 4 Ex. 254; 6 Ex. 123.
(4) 3 Ex. 268.

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that an emergency had arisen which gave the defendant's servant implied authority to invite the plaintiff into the cart for the purpose of rendering assistance to the injured boy. I was at first inclined to agree with that view, but I think that in principle the case is governed by *Cox* v. *Midland Counties Ry. Co.* (1), and that we cannot consistently with the decision in that case hold that in the circumstances of this case the driver of the cart had any implied authority to invite the plaintiff to get into the cart and render assistance. If there was no authority, there was in my opinion no duty towards the plaintiff imposed upon the defendant for breach of which the defendant can be held responsible.

Appeal allowed.

Solicitors for plaintiff: *E. C. Rawlings & Butt, for J. Herbert Neville, Chorley.*

Solicitors for defendant: *Barlow, Barlow & Lyde, for James Chapman & Co., Manchester.*

(1) 3 Ex. 268.

F. O. R.

COKER *v.* BOLTON.

1912
July 3, 4.

Insurance (Marine) - Policy on Freight—"Institute Time Clauses"—Constructive Total Loss of Ship—Freight earned after Casualty—Right of Insurer to Benefit of Freight—Subrogation.

The words "in full" in the clause of the Institute Time Clauses—Freight—1910, which provides that "In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or not chartered," do not mean "without benefit of salvage."

The plaintiff insured the hull of his ship under a time policy by which in the event of a constructive total loss the underwriters were to make no claim for freight whether notice of abandonment was given or not. He also insured the freight of the ship with other underwriters under a time policy containing the clause of the Institute Time Clauses—Freight—above set out. The ship while on a voyage during the currency of the policies stranded and became a constructive total loss. She was, however, towed in her damaged condition to her destination, where her cargo was discharged, and the freight (being less than the amount at which the freight was valued in the policy) was paid to the plaintiff. In an action on the policy on freight:—

Held, that the provision in the hull policy prevented the ordinary rule of law, by which in the event of a constructive total loss the right to the freight earned subsequently to the loss passes to the underwriters on hull, from applying, and that the defendants were entitled to a deduction in respect of the freight received by the plaintiff.

Trial of action before Hamilton J. without a jury.

The plaintiff, the owner of the steamship *Ivy*, effected by a time policy underwritten by the defendants an insurance on "freight (in and over) chartered or as if chartered on board or not on board and/or bunker coals out and freight only home," the freight being valued at 950*l*. There were attached to the policy what are known as the "Institute Time Clauses—Freight—1910," by clause 5 of which "In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or not chartered." During the currency of the policy, on December 2, 1910, the *Ivy* stranded in the river Mersey while on a voyage from the Baltic to Manchester with a cargo of grain, and as the result of such

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stranding became a constructive total loss. At the time of the stranding the *Ivy's* hull was insured under a time policy to which were attached the "Institute Time Clauses—Hulls—1910." By one of those clauses it was provided that "In the event of total or constructive total loss no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." Notice of abandonment was given by the plaintiff immediately upon the stranding to the underwriters of the hull policy, who, however, did not accept the abandonment, but on the same day, December 2, the Liverpool Salvage Association, on the suggestion of the underwriters of the hull policy, and by arrangement with the plaintiff but without prejudice to their refusal to accept the abandonment, took charge of the *Ivy*, towed her to Manchester, and discharged her cargo there. Thereupon the sum of 630*l.* 12*s.* became payable and was paid to the plaintiff for freight on the cargo. Subsequently the hull underwriters settled with the plaintiff. On December 8, 1910, the plaintiff gave notice of abandonment to the defendants, which was not accepted, but the plaintiff was placed by the defendants in the same position as if a writ had been issued. The defendants contended that in settling the plaintiff's claim on the freight policy they were entitled to deduct from the face value of the policy the 630*l.* 12*s.* received by the plaintiff for freight less the cost of floating the ship and towing her up to Manchester. The plaintiff claimed to be paid the valued amount of the freight in full as on a total loss.

Leslie Scott, K.C., and *J. W. Scott*, for the plaintiff. The event mentioned in clause 5 of the Institute Time Clauses—Freight—namely, the constructive total loss of the steamer, having happened, the plaintiff is entitled to be paid the amount underwritten in full, whether any freight was lost or not. But even if that is not the proper construction of that clause, and if it must be shewn that there was a total loss of the freight, that was the fact here. By the ordinary law "upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred

after the casualty": Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 63, sub-s. 2. But what is there called freight, and what passes on abandonment to the hull underwriters, is not strictly freight. By abandoning the ship the owner repudiates the contract of affreightment, and the remuneration which is paid by the cargo owners is paid, not as freight, but as a quantum meruit for services rendered in delivery of the cargo, and belongs to the underwriters, not as assignees of the contract of affreightment, but as owners of the ship which is instrumental in that delivery. The freight in the strict sense of the term is wholly lost. And the fact that there was a special stipulation in the hull policy that the underwriters should make no claim to the money paid by the cargo owners, whereby the plaintiff became entitled to retain a sum equal to the freight, did not preclude him from averring that the freight was lost and claiming for that loss against the freight underwriters. The money paid by the cargo owners, not being freight, was no part of the subject-matter of insurance under the policy on freight; therefore the defendants cannot claim to be subrogated to the plaintiff's right in respect of it, for it is only to salvage of the thing insured that the principle of subrogation applies: Marine Insurance Act, 1906, s. 79.

Bailhache, K.C., and *Lock*, for the defendants. The words "shall be paid in full" in the policy on freight refer to the words which follow, "whether the steamer be fully or only partly loaded, or in ballast," and mean that the assured shall be paid wherever the freight has been lost to him, whether it was lost directly by the perils insured against or not. If a shipowner on his ship becoming a constructive total loss gives notice of abandonment the right to freight subsequently earned is lost to him, because it belongs to the underwriters on hull, but notwithstanding that loss he cannot under an ordinary policy recover for it against the freight underwriters because it was so lost, not by the perils of the seas, but by his own voluntary act in giving notice of abandonment. It was to meet that difficulty that this clause was designed. The words "in full" do not mean that if the freight has in fact been earned and received by the shipowner he shall be paid for it as though

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it were lost merely because there was a loss of the steamer. Such a construction would convert the policy into a gaming policy. To entitle the plaintiff to recover in full he must shew that there was a total loss of the freight to him. For that purpose the parties must be treated as though there were no policy on the hull at all; and if there were no such policy it is obvious that there has been no loss of freight, for the plaintiff has got it. Under those circumstances the defendants are entitled to the benefit of the salvage of that freight.

HAMILTON J. In this case the plaintiff was insured with the defendant under a time policy on freight by his steamship *Ivy* valued at 950*l*. To the policy were attached the Institute Time Clauses—Freight—1910, by No. 5 of which "In the event of total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered," and the parties desire to have the construction of that clause decided. It is agreed that the ship while on a voyage from the Baltic to Manchester stranded in the Mersey and became a constructive total loss, that she was subsequently towed up to Manchester and discharged her cargo, whereupon the sum of 630*l*. 12*s*. was paid to the plaintiff by the cargo owners for freight. Notwithstanding the receipt and retention of that sum by the plaintiff he contends that he is entitled to be paid on the policy "in full." The effect of that contention is to treat clause 5 as a separate and independent insurance which gives to the plaintiff, apart from any loss of freight, the right to receive the amount of the policy in the event of the total loss of the steamer. It is argued that the effect of the words "in full" is the same as if they were "without benefit of salvage," but it is to my mind clearly contrary to the intention of the parties to treat this clause as a wagering policy imported into the transaction as a separate contract by clause 5. Moreover if it is to be regarded in that light I should have no power to enforce it. In this case the plaintiff had an insurance on the hull, but to the policy were attached the Institute Time Clauses—Hull—1910, which provide that "In the event of

total or constructive total loss no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." Had there been here no hull insurance at all there could in the circumstances of this case have been no claim against the underwriters on freight, for the plaintiff would have earned his freight and have been entitled to retain it. If the plaintiff's ship had been insured under an ordinary Lloyd's policy not containing the above-mentioned clause, the plaintiff having given notice of abandonment, the hull underwriters would have been entitled as abandonees of the ship to the sums received from the cargo owners on delivery of the cargo, and although the money might have been in fact received by the hand of the shipowner, he would have so received it only in trust for the hull underwriters. Consequently the freight underwriters could not claim it as salvage, the shipowner having no right in respect of it to which they could be subrogated. It is said that I must deal with this case as if the policy here were in that form, and as though s. 63, sub-s. 2, of the Marine Insurance Act, 1906, applied, and must disregard the fact that the hull underwriters have by the special clause in their policy released their right to this money as being res inter alios acta, the benefit of which the freight underwriters cannot claim. It is contended that the right of the plaintiff to retain the money did not arise out of the contract of affreightment, that the money was not the fruit of its performance but was earned by the hull underwriters as remuneration for the service rendered by them as owners of the ship in delivering the cargo, and that the plaintiff's title to it is as assignee of that remuneration. There is nothing to prevent the parties interested in the abandonment of the ship from agreeing beforehand that the provisions of s. 63, sub-s. 2, shall not apply, and I think that the effect of the Institute Time Clause in the hull policy was simply to prevent those provisions from applying, and in that view the hull underwriters did not assign to the plaintiff any right to the money received from the cargo owners, for they had no such right to assign. For the purpose of ascertaining the real circumstances under which the shipowner received this money one is entitled to look at his contract with third parties.

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The effect of the contract with the hull underwriters is that the shipowner never ceded his right to freight earned subsequently to the casualty, that as he succeeded in delivering the cargo, although by means of a damaged ship, he was entitled to be paid for so doing under his contract of affreightment, and that as, notwithstanding the constructive total loss of the ship, there has been salvage of that freight, the underwriters on freight are entitled to the benefit of it. Mr. Leslie Scott contended that no effect could be given to the words "in full" in clause 5 if the shipowner were obliged to allow a deduction in respect of the salvage of freight. In my opinion that clause was introduced for the purpose of meeting the hardship that has long been felt to exist that a shipowner, who has given notice of abandonment and has consequently lost his right to the freight subsequently earned, is precluded from suing on the policy on freight. In *United Kingdom Mutual Steamship Assurance Association* v. *Boulton* (1), where the rules of a freight club contained a very similar clause, Bigham J. construed it as intended to secure that where freight was lost to the shipowner not by perils of the sea but by the operation of the notice of abandonment in transferring to the underwriters on hull the freight which was eventually earned, the assured should nevertheless recover it from the underwriters on freight as though it had been lost entirely by perils of the sea. I think that the plaintiff's construction of the clause fails, and that the defendants are entitled to the deduction claimed.

Judgment for defendants.

Solicitors for plaintiff: *Lightbound, Owen & Co.*
Solicitors for defendants: *Pritchard & Sons.*

(1) (1898) 3 Com. Cas. 330.

J. F. C.

HARROWING STEAMSHIP COMPANY *v.* THOMAS.

1912

July 17, 18, 19

Charterparty—Lump Sum Freight—Loss of Ship by Excepted Peril—Delivery of Part of Cargo—Right of Shipowner to Freight.

The plaintiffs chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum as freight. The freight was payable on right delivery of the cargo. The charterparty contained the usual exception of perils of the seas. The ship arrived with her cargo on board outside the port of discharge, when owing to heavy weather she was driven ashore and became a total loss. Part of the cargo was washed ashore and was afterwards collected on the beach by the directions of the master and deposited on the dock premises, the residue being lost by the perils of the seas. In an action to recover payment of the lump sum freight:—

Held, that the shipowners, having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract and earned their freight, notwithstanding that the ship had not completed her voyage and that the portion of the cargo delivered had been so delivered otherwise than by the ship stipulated for.

TRIAL of action before Pickford J. without a jury.

By a charterparty dated September 1, 1911, and made between Messrs. Robert Harrowing & Co. for the owners of the steamship *Ethelwalda* and William Thomas & Sons, charterers, it was agreed that the ship should load at a place in the Ulcaborg district in Finland a full and complete cargo of pit props and being so loaded should proceed to "Port Talbot a dock as ordered . . . . and deliver the same always afloat on being paid freight as follows:—A lump sum 1600*l*. . . . . The freight to be paid in cash . . . . on unloading and right delivery of the cargo." The charterparty contained an exception clause, which included the usual exceptions, and amongst others perils of the seas. The ship loaded her cargo and proceeded to Port Talbot and anchored off the port on the evening of October 29. On the following morning owing to heavy weather she was driven ashore just outside the breakwater of the entrance channel to the dock, and eventually became a total loss. The deck cargo was swept off by the seas and a good deal of it was washed ashore. The cargo in the hold was also gradually washed out, the process being assisted

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by holes cut in the ship's side for the purpose, and a substantial part of this cargo also found its way on to the beach. An agreement was entered into between the master and a firm of Jenkins & Co. whereby the latter undertook to provide horses, carts, and hauliers to haul and place on the Port Talbot Dock Company's land such of the pit props ex *Ethelwalda* as were washed up on the beach at 5*s.* 6*d.* per ton. The master stipulated that the cargo when deposited with the dock company should be held by them under a lien for freight. In pursuance of that agreement Messrs. Jenkins & Co. recovered and stored on the dock premises a considerable proportion of the cargo. A portion of it, however, was never recovered, being lost by the perils of the seas. The dock company took possession of the cargo as it was brought to them and affected to hold it under a lien for freight for the shipowners, and also under a lien for their own charges. Messrs. Thomas, the charterers and consignees of the cargo, claimed to have it delivered to them free from any charge for freight. The dock company refused to give it up, and an action was accordingly brought against them by Messrs. Thomas, with the result that an order was made by Scrutton J. that on payment by the then plaintiffs of the sum of 1347*l.* 9*s.* into the joint names of the respective parties' solicitors the dock company should release the cargo. The present action was brought to recover the said sum of 1347*l.* 9*s.*, being the amount of the lump sum freight as per charterparty less 252*l.* 11*s.* advanced at Ulcaborg. Alternatively the plaintiffs claimed the said sum as a quantum meruit or as a reasonable freight for the voyage to the place of stranding and the expenses incurred in forwarding the props to the dock; and in the further alternative they claimed for salvage services rendered to the cargo.

Bailhache, K.C., and *Dunlop*, for the plaintiffs. Where a charterparty provides for the payment of a lump sum freight the shipowner is entitled to the freight if he delivers any part of the cargo at its destination, at all events if his failure to deliver the remainder is due to excepted perils. The provision that the freight shall be payable on right delivery of the cargo does not necessarily mean on delivery of the whole cargo shipped: *The*

Norway (1); *Robinson* v. *Knights* (2); *Merchant Shipping Co.* v. *Armitage* (3)—the reason being that which is given by the Privy Council in *The Norway* (4), that although in such a charterparty the lump sum is called freight "it is not properly so called, but it is more properly a sum, in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages." At the same time it is not a condition precedent to the right to the lump sum freight that the ship should have completed her voyage and been the instrument of delivery of the cargo. The shipowner on finding himself prevented by the excepted perils from carrying the cargo to its destination in the chartered ship is at liberty to tranship it into another ship, and on delivery by the substituted vessel he will be entitled to his freight. In *Mitchell* v. *Darthez* (5), where a ship, having been chartered for a lump sum, became so damaged by perils of the sea as to be unable to complete her voyage, and, a portion of the cargo having been lost, the residue of the cargo was sent on by another ship, it was held that the shipowner was not entitled to the freight. But the ground of that decision, as appears from the judgment of Tindal C.J. (6), was that the goods had been so sent on by the Vice-Consul of the port at which they were landed in the name and on behalf of the owners of the cargo and at their expense, and therefore could not be said to have been carried to their destination by the owner of the chartered ship. That case is inferentially an authority that if part of the cargo be sent on at the shipowner's expense he will be entitled to his freight. A shipowner who has been prevented by excepted perils from performing his complete contract under a lump sum charter will be disentitled to freight only if there has been a total failure of consideration; and there is no total failure of consideration if either the chartered ship or a part of the cargo arrives at the destination.

Mauran Hill, K.C., and *Lord*, for the defendants. The plaintiffs never earned the freight contracted for. Lump sum freight is "an entire sum to be paid for the hire of the ship for one entire

(1) (1864) Br. & L. 404.
(2) (1873) L. R. 8 C. P. 465.
(3) (1873) L. R. 9 Q. B. 99.
(4) Br. & L. at p. 408.
(5) (1836) 2 Bing. N. C. 555.
(6) Ibid. at p. 569.

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service": per Keating J., *Robinson* v. *Knights* (1); it is "a stipulated gross sum to be paid for the use of the whole ship for the whole voyage": per Brett J. (1) Therefore to entitle the shipowner to his freight in such a case it is essential that the ship should complete her voyage. The shipowner must perform the voyage with that particular ship; a substituted ship or other instrument of delivery will not do, even though it be used for carrying the whole cargo. Still less will it do if it is used for carrying only a portion of the cargo. It is true that in *Mitchell* v. *Darthez* (2) Tindal C.J. gave as his reason for holding that the plaintiff was not entitled to the freight that the cargo could not under the circumstances of that case be said to have been carried to its destination by the plaintiff. But the suggestion that carriage of the cargo by a substituted ship, if it be so carried at the expense of the shipowner, will entitle him to recover a lump sum freight cannot be supported in view of the later decisions in *The Norway* (3) and *Robinson* v. *Knights*. (1) The contract to be performed by the shipowner is the arrival of the ship with so much of the cargo on board as has not been lost by excepted perils. In *Appleby* v. *Myers* (4), where the plaintiffs had contracted to do certain work on the defendant's premises for a lump sum and after a certain portion had been done the premises were destroyed by an accidental fire, and the Exchequer Chamber held that the plaintiffs, though excused from further performance of the contract, were not entitled to recover in respect of the portions of the work completed, Blackburn J., delivering the judgment of the Court, said: "The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight pro rata."

Bailhache, K.C., in reply. In order to perform the plaintiffs contract it is not necessary that the identical ship should arrive.

(1) L. R. 8 C. P. 465.
(2) 2 Bing. N. C. 555.
(3) Br. & L. 404.
(4) (1867) L. R. 2 C. P. 651.

The fallacy of the defendants' contention lies in the assumption that a lump sum charter is not a contract for the carriage of goods. The decision in *The Norway* (1) cannot be fairly read as asserting that proposition. The contract is indeed a contract for the hire of a ship, but for its hire as a vehicle of cargo. Some authorities support the view that it is the duty of the shipowner by every reasonable and practicable method to convey the cargo to its place of destination, and that if he is prevented by excepted perils from so conveying it in his own ship he is bound to tranship it and forward it in another. But whether he is bound to tranship or not, he is at all events at liberty under such circumstances to tranship: *Shipton* v. *Thornton* (2); and he is equally so at liberty whether the chartered freight be a lump sum or a rate per ton. No doubt transhipment cannot be justified unless the shipowner is prevented from completing the voyage in his own ship without any default on his part, but that would just as much be the case under an ordinary freight charter as under a lump sum charter.

PICKFORD J. The question is whether under the circumstances of this case shipowners who have chartered their ship on what is called a lump sum charter, that is a charter in which the remuneration for the services to be performed by the shipowners is one lump sum and not a sum per ton, are entitled to recover that freight. Being a lump sum they must recover it all or none at all. In the first place it was contended for the charterers that they were not liable to pay it on the ground that what is called lump sum freight is not freight at all, but is a payment for the hire of the ship for an entire voyage, and that unless the ship arrives at her destination, although the whole of the cargo may arrive and be delivered to the consignees, no freight is payable at all. If that broad proposition is correct it is clear that there was no liability to freight here, for the ship was not an arrived ship. She had got off the port but had not got to her chartered destination. Secondly it was contended that, if the first proposition was wrong and if it was not an essential condition that the ship herself should arrive, i. that is to say,

(1) Br. & L. 404. (2) (1838) 9 Ad. & E. 314.

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Pickford J.

the freight was payable not for the voyage of the ship but for the carriage of the cargo, then, as the freight was one entire sum for one entire service, the shipowners could not be entitled to it unless the whole cargo was delivered, and here the plaintiffs had only delivered a part. Thirdly it was contended that, in the circumstances of this particular case, even assuming that the shipowners might be entitled to perform their contract by transhipping the cargo and sending it on by another vessel, that was not what was done here, because the cargo had been washed out of the ship by the sea and had been taken out of their possession altogether, and it was said that it was not like a case of transhipment, but was mere salvage. This last point must be determined with reference to the contract made by the master with Messrs. Jenkins & Co., and, having regard to his stipulation that the cargo was to be held under a lien for freight, I think that that was a contract made for the purpose of enabling the plaintiffs to earn their freight. With regard to the first contention I cannot think that on this charter it is essential, in order that freight should be earned, that the ship mentioned in the charter should arrive. I do not say that there may not be lump sum charters, in which the freight, being payable for the use of the particular ship, is not to be paid unless the ship completes her voyage. There may be such charters, but I do not think that that is the effect of the present one. This is an ordinary charterparty for the services of a ship to carry a particular cargo to a particular port. In its original printed form the rate at which freight was to be paid was in respect of certain classes of timber so much per St. Petersburg standard, and in respect of certain other classes so much per fathom. Those printed rates were struck out and the lump sum freight was substituted in ink. But if the charterparty had been executed in its original form it would not be disputed that the shipowners, if their ship had been disabled from completing its voyage by perils of the seas, would have been entitled to tranship the cargo into another ship, and if by that means they had delivered the whole cargo to the consignees they would be entitled to the freight; and equally it seems to me that with a charterparty in the form in which it was executed the consignees could not have refused to pay the freight any

more than they could if it had been payable per standard or per fathom. I cannot think that altering the rate of payment can have the effect of altering the primary obligations and rights of the shipowners and consignees under the charter. Further, if the plaintiffs, upon their own ship being disabled, would have been entitled to tranship the whole cargo into another vessel, I think they would have been equally entitled to deliver the whole cargo by the means by which they did. I cannot see that it can make any difference that the cargo, instead of being taken out of one ship and put into another, was in fact swept out of the ship by the sea and washed ashore and afterwards collected by the shipowners and delivered to the consignees. The fact, if it was the fact, that the timber so washed ashore was for a time out of the plaintiffs' control does not seem to me to be material.

But the difficulty in the present case arises from the fact that only a part of the cargo was delivered. There is no provision for apportioning the freight pro rata in respect of the amount delivered. The shipowners must be entitled to the whole freight or to none at all, and they can only be entitled to the whole freight if they have performed their contract. The question to be determined is what is their contract, and that is a point as to which I confess I have felt very great doubts, which are not altogether removed. But I think you must look at the contract as a whole, that is to say, as one which has to be performed subject to certain excepted perils, and regard the shipowners as being under an obligation to perform their contract in its entirety so far as they are not prevented from doing so by the excepted perils—subject to this, that they cannot be regarded as having satisfied their obligation if by reason of the excepted perils they have been prevented from performing their contract at all. If the whole ship and cargo went to the bottom and nothing was ever delivered there would be a total failure of consideration and the freight, I take it, would not be payable. But that is not this case. In the present case a very substantial portion of the cargo was delivered, and in respect of the residue the plaintiffs are excused for non-delivery as it was lost by the perils of the seas. Therefore I have come to the conclusion, although with some doubts, as I think the point a very

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difficult one, that the plaintiffs did perform their contract and are entitled to the freight claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Trinder, Capron & Co.*

J. F. C.

C. A.

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July 23, 31.

[IN THE COURT OF APPEAL.]

WAKEFIELD RURAL DISTRICT COUNCIL *v.* HALL.

Revenue—Income Tax—Lands, Tenements, or Hereditaments—Waterworks—Annual Value—Profits—Rural District Council—Supply of Water to Contributory Places—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched.* (*A.*), *No. III.*; *s.* 100, *Sched.* (*D.*); *s.* 101—*Revenue Act*, 1866 (29 & 30 *Vict. c.* 36), *s.* 8.

A rural district council under the powers conferred by the Public Health Act, 1875, supplied water to a number of contributory places. To some of these places the water was supplied at a profit, and to others at a loss to the council. In assessing the council under No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, in respect of the annual value or profits of waterworks, the surveyor of taxes took into account only those dealings which shewed a profit, on the ground that the undertaking of supplying water was in respect of each contributory place a separate undertaking or concern:—

Held, on the facts, reversing the decision of Hamilton J. [1912] 2 K. B. 265, that the undertaking of supplying water was in respect of each contributory place a separate concern, and that the council must pay the tax in respect of each contributory place which made a profit.

By s. 8 of the Revenue Act, 1866, the concerns described in No. III. of Sched. (A.) of the Income Tax Act, 1842, are to be charged and assessed in the manner in the said No. III. mentioned according to the rules prescribed by Sched. (D.) of the same Act of 1842 so far as such rules are not inconsistent with No. III. of Sched. (A.):—

Held, that this enactment does not constitute persons engaged in the concerns described in No. III. of Sched. (A.) "persons carrying on concerns in the nature of trade the profits whereof are made chargeable under the rules of Sched. (D.)" within the meaning of s. 101 of the Act of 1842 so as to entitle them under that section to set against the profits acquired in one or more of those concerns the excess of the loss sustained in any of the other concerns over and above the profits thereof.

APPEAL from a decision of Hamilton J. (1)

This was a case stated by the Commissioners for the General

(1) [1912] 2 K. B. 265.

Purposes of the Income Tax Acts for the Lower Agbrigg Division of the West Riding of Yorkshire.

It is thought well before setting out the case to state shortly the effect of certain sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55), with a view to the better understanding of the points raised in the case.

By s. 51 of that Act any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for these purposes or any of them may—

(1.) Construct and maintain waterworks, dig wells, and do any other necessary acts; and

(2.) Take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and

(3.) Contract with any person for a supply of water.

By s. 229, the expenses incurred by a rural authority in the execution of the Act are to be divided into general expenses and special expenses.

Special expenses are the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and maintaining any necessary works for that purpose, if and so far as the expenses of such supply and works are not defrayed out of water rates or rents under the Act.

Where the rural authority make any sewers or provide any water supply or execute any other work under the Act for the common benefit of any two or more contributory places within their district, they may apportion the expense of constructing and maintaining the work in such proportions as they think just, between the contributory places, and any expenses so apportioned to any such contributory place are to be deemed special expenses legally incurred in respect of such contributory place.

Special expenses are to be a separate charge on each contributory place.

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By s. 230, for the purpose of obtaining payment from the several contributory places of the sums to be contributed by them, the rural authority shall issue their precept to the overseers of each contributory place requiring the overseers to pay, within a time limited by the precept, the amount specified in the precept to the rural authority or to some person appointed by them.

The overseers must comply with the requisitions of the precept by levying a separate rate in the same manner as if it were a rate for the relief of the poor.

The Wakefield Rural District Council appealed against the following assessments to income tax (after deduction had been made in respect of establishment charges) made upon them under r. 3 of No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842 (1), for the year 1909-10, namely :—

	Profits.		
Waterworks for the Parish of	£	*s.*	*d.*
Alverthorpe cum Thornes .	60	0	0
Crigglestone	14	10	0
Crofton	134	0	0
Sharlston	139	0	0
	£347	10	0

The following facts were proved or admitted :—

1. These assessments were based upon the profits of the various waterworks above mentioned of the Wakefield Rural District Council as traders in water, taking into account only the parishes within the rural district in which a profit was made in trading in water as shewn by the accounts for the year ending March 31, 1909, but ignoring altogether the parishes in which a loss was made, and there was no dispute as to the correctness of the amounts except as hereinafter stated.

2. The appellants are the local authority for the district known as the Wakefield Rural District, which comprises the above-mentioned parishes and also the parishes of Bretton West, Chevet, Lupset, Newland, Shitlington, Warmfield, and Walton, and the council have in pursuance of the powers granted to them by the

(1) See note on p. 339, post.

Public Health Act, 1875, undertaken the supply of water to each of the following parishes comprised in their district:—

Alverthorpe cum Thornes	—Supply established	.	1889
Bretton West	„	„	1898
Crigglestone	„	„	1889
Crofton	„	„	1891
Sharlston	„	„	1889
Walton	„	„	1891
Warmfield	„	„	1890
Shitlington	„	„	1880
Lupset	„	„	1889

3. Each one of these parishes is a contributory place within the meaning of ss. 51 and 229 of the said Act.

4. The working of the water supplies for the parishes of Bretton West, Lupset, and Shitlington for the year 1908-9 without any deduction for establishment charges resulted in losses as follows:—Bretton West 6*l.* 10*s.* 8*d.*, Shitlington 49*l.* 8*s.* 5*d.*, Lupset 10*l.* 7*s.* 10*d.*; total 66*l.* 6*s.* 11*d.* In the parishes of Walton and Warmfield the receipts balanced with the expenditure after the proper deduction for establishment charges. Nothing is included in the assessments of 347*l.* 10*s.* in respect of Bretton West, Shitlington, and Lupset. There was no assessment in respect of Bretton West, Shitlington, and Lupset.

5. The water supplied to all the above-mentioned parishes is purchased in bulk by the appellants from the Wakefield Corporation under an agreement dated February 27, 1889.

6. The rents for water supplied are paid by the consumers only according to a scale for each contributory place.

7. Any deficiency resulting from the working of the water supply in a parish in any year is raised by a special expenses rate levied upon all the ratepayers of that parish in accordance with ss. 229 and 230 of the Public Health Act, 1875, and any surplus that may arise is carried forward to the credit of the parish to meet the cost of such supply for any following year.

8. The rates of each of the following contributory places, namely, Bretton West, Crigglestone, Crofton, Sharlston, Walton, Warmfield, and Shitlington, are separately mortgaged to the

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Public Works Loan Commissioners to secure sums of money that were advanced in order to provide the water supply.

9. Separate accounts are by law required to be kept for the water supply in each contributory place. The appellants have no power to divert and as a matter of fact never have diverted the profits arising from the water supply in any parish for the benefit of any other parish, or levied any deficiency elsewhere than in the parish where the deficiency arose, but have always carried forward any surplus to the credit of the parish where that surplus arose.

10. The following is a copy, omitting immaterial portions, of the notice of assessment served on the appellants.

"Notice of Assessment under Schedule D (No. III. Schedule A) of the Income Tax Acts, in respect of the annual value or profits arising from the following concerns, viz.: –

"List No. 1. Quarries of stone, slate, limestone or chalk, iron-works, gas works, salt springs or works, alum mines or works, water works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, ways, bridges, ferries, cemeteries, and other concerns of the like nature, from or arising out of any lands, tenements, and hereditaments or heritages, on the profits of the preceding year . . . .

"Parish of Wakefield.

"To Wakefield Rural District Council of Tetley House.

"Take Notice that an assessment has been duly made on you by the Commissioners for putting into execution the Income Tax Acts, for the year ending April 5, 1910, as follows:—

	Amount of Assessment.	Duty Payable.
	£ s. d.	£ s. d.
Under Schedule D, on the annual value or profits of Waterworks (List No. 1)	345 10 0	
Net amount chargeable at 1*s.* 2*d.* in the pound .	—	20 3 1"

11. The appellants contended (inter alia) (1.) that they were traders in water and should be treated for income tax purposes

as such, and that they should be assessed in respect of their trading in one sum after deducting losses from profits (as described in paragraph 11) as is done in the case of all other traders, and accordingly claimed to have the total assessments reduced to the sum of 104*l.* 10*s.* 1*d.* arrived at as follows :—

ORIGINAL ASSESSMENTS WITHOUT DEDUCTION OF ESTABLISHMENT CHARGES.

Alverthorpe, Crigglestone, Crofton, Sharlston, Walton, Warmfield	£585	10	0
Deduct losses	66	6	11
	519	3	1
Deduct establishment charges	414	13	0
	£104	10	1

12. They pointed out that the council is the person assessed, the notice of assessment being addressed to them, in respect of the profit which the council made in respect of these waterworks, and that all the property in and the management of the water supplies is vested in them, and that the water is purchased by them for all the parishes and is supplied to them under one agreement with the Wakefield Corporation.

13. The appellants further contended (2.) that as each assessment amounted to less than 160*l.* total exemption could be claimed in each case.

14. The surveyor contended (inter alia) that each parish was a contributory place and no general supply had been undertaken for the whole rural district, and that each water undertaking for each separate parish was a separate concern and was properly assessed separately.

15. He further pointed out that separate accounts were kept for the water supply in each contributory place and that the

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appellants had no power to divert and as a matter of fact never had diverted the profits from any parish or levied any deficiency elsewhere than upon the parish itself where the deficiency arose; that the profits in fact and in law belonged to the ratepayers of the particular parishes in which they were earned, and that the appellants were assessable as trustees, agents, or representatives of such ratepayers.

16. The Commissioners held that the water undertakings were separate concerns, and confirmed the assessments. They also came to the conclusion that the appellants were not entitled to exemption.

Hamilton J. held that the undertaking of supplying water was not in respect of each contributory place a separate concern, but that the waterworks as a whole constituted one concern, and that the council was to be charged upon the balance of profits over losses.

The Crown appealed.

Sir J. Simon, S.-G., and *W. Finlay*, for the Crown. These contributory places are separate concerns within r. 3 of No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, although carried on by the same rural district council. It is admitted that the expenses incurred by the council in carrying on the waterworks are to be divided under s. 229 of the Public Health Act, 1875, into general expenses and special expenses; separate accounts have to be kept, and the special expenses are a separate charge on each contributory place. The council have always acted in this way and kept the different parishes separate; they have never allowed the profits or expenses of one parish to be mixed up with those of another; and they cannot do so for purposes of income tax. The tax is a special expense chargeable on each contributory place. Profits made by any place are reserved for the benefit of that place and are never applied to any other place nor handed over to the council. The question turns on the meaning of the word "therefrom" in No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, and it is submitted that "the profits received therefrom" means from the separate

concern: *Earl Jersey* v. *Uxbridge Rural Sanitary Authority*. (1) These waterworks are not one general concern for the whole district so as to make income tax chargeable on the balance of profits. A person who lives in a parish which makes a loss cannot be called on to pay for the inhabitants of a parish which makes a profit. The fact that water is taken in bulk and supplied to several places through the same main makes no difference. Water need not be supplied to any of these places from the same source or at the same price as to the others. A slight difficulty of construction arises from the fact that there is no singular of the word "waterworks" used in r. 3 of No. III. of Sched. (A.) to s. 60 of the Act of 1842.

Sect. 8 of the Revenue Act, 1866, does not enable the council to deduct from the amount of the profits in the profitable parishes the amount of the loss in unprofitable parishes. It enacts that concerns described in No. III. of Sched. (A.) shall be charged and assessed "according to the rules prescribed by Sched. (D.) of the said Act so far as such rules are consistent with the said No. III." But s. 101 of the Act of 1842 is the provision which allows taxation on a balance of profits between two concerns carried on by the same person; and that is not a rule prescribed by Sched. (D.). Further, the Act of 1866 does not transfer the concerns mentioned in No. III. from Sched. (A.) to Sched. (D.), and s. 101 only deals with cases under Sched. (D.): *Coltness Iron Co.* v. *Black*. (2)

Ryde, K.C., and *Konstam* (*Compston* with them), for the council. On the facts of the case it is clear that there is only one concern. That is shewn by the agreement under which the council are supplied with water by the Wakefield Corporation. The contributory places have no power to interfere with that supply. It is taken in one undivided amount. Physically this is one concern, and the Crown cannot go behind that for income tax purposes. The water in the pipes is common to all the places; it is impossible to say to which place it will go. It comes from the same source. If the Wakefield Corporation worked the water supply themselves it would be one undertaking only. *Earl*

(1) [1891] 3 Ch. 183. (2) (1881) 6 App. Cas. 315.

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Jersey v. *Uxbridge Rural Sanitary Authority* (1) turned on the point of delay; the present question did not arise, for income tax had been provided for. The council itself is one and indivisible, it carries on this one business on behalf of nine parishes, and it is the body liable to pay the tax: *Mersey Docks* v. *Lucas* (2); *Leeds Corporation* v. *Sugden*. (3) The liability to income tax is imposed by the schedules to the Act of 1842, and the measure of it is worked out by the rules. Waterworks came under Sched. (A.); by the Act of 1866 they were not transferred to Sched. (D.), but are to be treated according to the rules of (D.) so far as consistent with (A.). They thus come under s. 101 and only pay on the balance of profits where they carry on more than one concern.

Sir J. Simon, S.-G., replied.

Cur. adv. vult.

July 31. COZENS-HARDY M.R. This appeal involves a consideration of several sections of the Public Health Act, 1875, and of the Income Tax Acts. The plaintiffs, the Wakefield Rural District Council, are by s. 51 of the Public Health Act, 1875, empowered to provide their district or any contributory place therein with a supply of water proper and sufficient for public and private purposes, and for that purpose they have power to construct and maintain waterworks or to contract with any person for a supply of water. "Waterworks" are defined in s. 4 and they have a far wider meaning than is commonly attributed to that word. By s. 229, expenses incurred by the rural authority are divided into "general expenses" and "special expenses"; the latter include the expenses of providing a supply of water to any contributory place. They are empowered to apportion, between the several contributory places, any expenses incurred for the intending benefit of any two or more contributory places. "General expenses" are payable out of a common fund to be raised out of the poor rate of the parishes in the district, but "special expenses" are to be a separate charge on each

(1) [1891] 3 Ch. 183. (2) (1883) 8 App. Cas. 891.
(3) (1911) 9 L. G. R. 461.

contributory place. Provision is made in s. 230 for raising the money required for general expenses and for special expenses. In 1880 the rural district council undertook the supply of water to Shitlington, one of the contributory places. It does not appear from what source the water for such place was obtained. In February, 1889, an agreement was made between the Corporation of Wakefield and the rural sanitary authority for the supply of water to the authority in bulk upon certain terms set out in the agreement. Since that agreement, the various contributory parishes have been supplied with water at different dates from 1889 to 1898. All the water supplied has come from the Wakefield Corporation. On four of the parishes so supplied there were profits for the year 1909-10 of 347*l.* But there was a loss in respect of some of the other parishes, with the result that the 347*l.* was reduced to 104*l.*, and the question in this appeal is whether under s. 60, Sched. (A.), No. III., r. 3, the supply of water to all the parishes is to be treated as one concern, or whether the supply to each parish is to be treated as a separate concern.

Paragraph 9 of the special case is as follows: "Separate accounts are by law required to be kept for the water supply in each contributory place. The appellants have no power to divert and as a matter of fact have never diverted the profits arising from the water supply in any parish for the benefit of any other parish, or levied any deficiency otherwise than in the parish where the deficiency arose, but have always carried forward any surplus to the credit of the parish where that surplus arose." In my opinion this shews that the rural authority have done precisely that which was their legal duty. It seems to me that in the face of that paragraph it is very difficult to contend that they are not separate concerns. If one parish had been supplied by an artesian well, and a second parish by pumping from a river, and a third parish by water purchased from Wakefield, they would, as it seems to me, have plainly been separate concerns, and I cannot see that it makes any real difference that the water is taken in bulk from Wakefield and supplied to the several parishes. There are, no doubt, common mains, as well as separate mains, but express provision is made in s. 229

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for apportioning this common expense. I attach no importance to what has been called by Mr. Ryde "the physical unity of the supply." It would have been quite possible to have the water conveyed from Wakefield to each of the separate parishes by separate pipes, and I cannot think that the use of common mains can alter the rights of the parties. It follows, therefore, that, in my opinion, each contributory parish which makes a profit ought to pay income tax on such profit. When I say that the parish ought to pay, I mean, of course, that the rural authority ought to pay and debit the amount paid against the particular parish.

It was strongly contended by Mr. Ryde that the only concern was that of the district council, and that it is contrary to the whole scheme of the Act to take into consideration the mode in which profits may ultimately have to be distributed. I assent to this view if, but only if, there is only one concern. The argument can have no validity if there are really separate concerns, though conducted by the same corporation for the benefit of wholly different persons or objects. On this point I differ from the view of Hamilton J.

A separate point was raised by the rural authority based upon s. 101 of the Act of 1842 and s. 8 of the Act of 1866. It was argued that, even assuming that they were separate concerns, the combined effect of the two sections above referred to is to entitle the rural authority to deduct from the profits of one concern the losses made on the other. But I agree with Hamilton J. in thinking that this argument cannot prevail. Income tax, in the present case, is charged under Sched. (A.). Sect. 101 deals only with cases where profits are chargeable under the rules of Sched. (D.). Sect. 8 of the Act of 1866 does not transfer the concerns from Sched. (A.) to Sched. (D.). It only amplifies the somewhat concise rules contained in No. III. of Sched. (A.) by making the far more elaborate rules prescribed by Sched. (D.) applicable so far as such rules are consistent with No. III. It in no way incorporates s. 101, which is not, and cannot be called, a rule prescribed by Sched. (D.). The Act of 1866, in short, gave fuller directions for ascertaining profits on points where Sched. (A.) was silent, but it had no further or

other effect. In my opinion the appeal on the part of the Crown must be allowed.

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FARWELL and KENNEDY L.JJ. concurred.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Blundell, Gordon & Co., for H. Beaumont, Wakefield.*

NOTE.—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60: "The duties hereby granted and contained in the said schedule marked (A.) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said duties, as if the same had been inserted under a special enactment.

. . . . . .

"No. III.—Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding general rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited: . . . .

"Third.—Of iron works, gas works, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways, and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding:

"The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil as property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern:"

Sect. 100: "The duties hereby granted, contained in the schedule marked (D.) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to

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the said last-mentioned duties, as if the same had been inserted under a special enactment.

"SCHEDULE (D.).

"The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A.), (B.), or (C.), and to every description of employment or profit not contained in Schedule (E.), and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons, bodies politic or corporate, fraternities, fellowships, companies, or societies, whether corporate or not corporate, receiving or entitled unto the same, their executors," &c.

Sect. 101: "Provided always . . . . that nothing herein contained shall be construed to restrain any person carrying on . . . . two or more distinct trades, manufactures, adventures, or concerns in the nature of trade, the profits whereof are made chargeable under the rules of Schedule (D.), from deducting or setting against the profits acquired in one or more of the said concerns the excess of the loss sustained in any other of the said concerns over and above the profits thereof, in such manner as may be done under this Act where a loss shall be deducted from the profits of the same concern, or to restrain any of such persons from making separate statements thereof, ... and the respective Commissioners shall have authority to allow such deductions as in other cases, and to assess such person accordingly."

Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8: "The several and respective concerns described in No. III. of Schedule (A.) of the said Act passed in the fifth and sixth years of Her Majesty's reign, chapter 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule (D.) of the said Act, so far as such rules are consistent with the said No. III. . . . ."

H. C. R.

[COURT OF CRIMINAL APPEAL.]

REX *v.* STEPHENSON.

Criminal Law—Sufficiency of Indictment—Indecent Assault on Girl under Thirteen—Absence of Averment of Age of Girl—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 52—*Criminal Law Amendment Act*, 1880 (43 & 44 *Vict. c.* 45), *s.* 2—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 123, *sub-s.* 2.

By s. 52 of the Offences against the Person Act, 1861, "Whosoever shall be convicted of any indecent assault upon any female . . . . shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

By s. 2 of the Criminal Law Amendment Act, 1880, "It shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency."

By s. 123, sub-s. 2, of the Children Act, 1908, "Where in a charge or indictment for . . . . any of the offences mentioned in the First Schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person . . . . in respect of whom the offence was committed was . . . . under . . . . any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence . . . . under . . . . the specified age . . . . he shall for the purposes of this Act be presumed at that date to have been . . . . under . . . . that age . . . ."

Among the offences mentioned in the First Schedule to the Act of 1908 is any offence under s. 52 of the Offences against the Person Act, 1861, against a child (defined by s. 131 of the Act of 1908 as a person under the age of fourteen years).

An indictment for an indecent assault upon a girl under thirteen years of age contained no averment as to her age:—

Held, that although in the absence of an averment that the girl was under thirteen years of age the prosecution was deprived of the benefit of the presumption which would have arisen under s. 123, sub-s. 2, of the Children Act, 1908, if the indictment had contained the averment and she had appeared to the Court to have been at the date of the commission of the offence under the age of thirteen, the indictment was good, inasmuch as s. 2 of the Criminal Law Amendment Act, 1880, only deprives the prisoner of the defence of consent of the young person under the age of thirteen, but does not create a new offence, and there was no omission of any matter necessary to be proved in order to convict the prisoner upon the indictment.

APPEAL by Joseph Stephenson against his conviction.

The appellant was indicted at the Court of quarter sessions for the county of Glamorgan for unlawfully and indecently assaulting

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one Ethel May Norris. The form of the indictment (omitting formal parts) was "that" the appellant "on the 11th day of May in the year of our Lord one thousand nine hundred and twelve at the parish of Gelligaer Ethel May Norris did unlawfully and indecently assault and her the said Ethel May Norris then did beat and other wrongs do to the said Ethel May Norris against the form of the statute in such case made and provided and against the peace of our Lord the King his Crown and Dignity."

Ethel May Norris was a girl under thirteen years of age, and the appellant pleaded "not guilty" to the indictment. Before the case for the prosecution was opened the objection was taken by counsel on behalf of the appellant that the indictment was bad upon the ground that the age of the assaulted girl was not stated in it. The chairman of the Court of quarter sessions reserved the decision of the Court; the trial proceeded, and the jury found the prisoner guilty. The Court, after consideration, being of opinion that the indictment might be bad upon the ground that it did not contain an averment that the girl was under thirteen years of age, ordered the appellant to be liberated on his entering into recognizances in the sum of 10*l.* binding himself to come up for judgment at the next quarter sessions of the peace in order that an opportunity might be given to obtain the opinion of the Court of Criminal Appeal.

The appellant appealed against his conviction upon the ground (inter alia) that "the indictment was bad inasmuch as it did not state the age of the girl, who was under thirteen years of age, although the indictment was brought under the Criminal Law Amendment Act, 1880, and the Offences against the Person Act, 1861." (1)

(1) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 52: "Whosoever shall be convicted of any indecent assault upon any female . . . . shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Criminal Law Amendment Act, 1880 (43 & 44 Vict. c. 45), s. 2: "It shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency."

Children Act, 1908 (8 Edw. 7, c. 67), s. 123, sub-s. 2: "Where in a charge or indictment for an offence

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T. W. Laugmead, for the appellant. The indictment is bad by reason of the absence of any averment that the girl was under thirteen years of age. In Archbold's Criminal Pleading, 24th ed., p. 1018, it is said that "Where the assault is on a girl under thirteen, the fact that she is so should be stated in the indictment, because of 43 & 44 Vict. c. 45, s. 2 . . . . ; and because of the provisions as to presuming age in 8 Edw. 7, c. 67, s. 123, sub-s. 2, and Schedule I." In order that it may be good an indictment must contain all the essential ingredients of the offence with which the defendant is charged. By s. 24 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), it is enacted that no indictment shall be insufficient for want of the averment of "any matter unnecessary to be proved." That section shews that anything that it is necessary to prove in order to convict the prisoner of the charge brought against him must be stated in the indictment.

[PHILLIMORE J. The defendant is charged with committing an indecent assault. In order to convict the prisoner of that charge it is not necessary to prove that the assaulted girl was under thirteen. By the Criminal Law Amendment Act, 1880, s. 2, the prisoner is deprived of the defence of consent if the girl is under thirteen. But the statute does not create a new crime.]

The Criminal Law Amendment Act, 1880, and s. 52 of the Offences against the Person Act, 1861, must be read together, and the effect of the Act of 1880 is that that which would have been no crime under the Act of 1861, namely, indecent conduct towards a girl under thirteen with her consent, is made a crime

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under this Act, or any of the offences mentioned in the First Schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person . . . . in respect of whom the offence was committed was . . . . under or above any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence . . . under or above . . . . the specified age . . . . he shall for the purposes of this Act be presumed at that date to have been . . . . under or above that age, as the case may be, unless the contrary is proved."

"FIRST SCHEDULE.

"Any offence . . . . against a child" under s. 52 of the Offences against the Person Act, 1861.

Sect. 131: "For the purposes of this Act unless the context otherwise requires—

"The expression 'child' means a person under the age of fourteen years . . . ."

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by the Act of 1880. In effect, therefore, the Criminal Law Amendment Act, 1880, creates a new offence. *Reg.* v. *Martin* (1) is an authority in support of that proposition. Sect. 123, sub-s. 2, of the Children Act, 1908, enacts that where in an indictment for an offence mentioned in the First Schedule to that Act it is alleged that the person in respect of whom the offence was committed was under any specified age and the person appears to the Court to have been at the date of the commission of the alleged offence under the specified age, the person shall for the purposes of the Act be presumed to be under that age unless the contrary is proved. An indecent assault upon a female is included in the First Schedule to that Act. It is therefore clear that that statute contemplates the age of the person assaulted, if under thirteen, being stated in the indictment, and that the effect of the averment is to alter the onus of proof. [*Reg.* v. *Lock* (2) and Archbold's Criminal Pleading, 24th ed., p. 58, were also referred to.]

A. S. Comyns Carr, for the prosecution, was not called upon.

The judgment of the COURT (Darling, Phillimore, and Hamilton JJ.) was delivered by

DARLING J. In this case the appellant was indicted for having committed an indecent assault upon a female, and the indictment did not state her age. She was in fact a girl under thirteen, and it would therefore have been of no advantage to the appellant to prove that she consented. It is contended on his behalf that the indictment is bad because it does not allege that the girl was under thirteen. The contention is that the Criminal Law Amendment Act, 1880, creates a new offence by the enactment contained in s. 2, which says that "it shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency."

It appears to us that the statute does not create a new offence. It deprives the defendant of what would have been a defence to an indictment for the committal of the indecent assault. But it is no more necessary to include in the indictment an allegation that the prosecutrix was under thirteen years of age than that

(1) (1839) 9 C. & P. 213. (2) (1872) L. R. 2 C. C. R. 10.

she was over sixty or seventy. The fact that the prosecutrix is under thirteen may appear from the evidence, but it is not necessary to allege it in the indictment.

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As to the statement in Archbold's Criminal Pleading that if the girl is under thirteen years of age "the fact that she is so should be stated in the indictment"—if by the words "should be" is meant that if the girl's age is averred the prosecution obtains an advantage, the statement is true, because the Children Act, 1908, mentions, in its schedule, s. 52 of the Offences against the Person Act, 1861, and therefore by stating the age of the girl the prosecution by virtue of s. 123, sub-s. 2, of the Children Act, 1908, raises a presumption that the girl is under thirteen years of age if it appears to the Court that the girl was at the date of the commission of the alleged offence under that age. In the present case it may be that the prosecution by omitting to aver the age of the girl was deprived of the benefit of a presumption that she was under thirteen years of age, but the contention on the appellant's behalf that s. 24 of the Criminal Procedure Act, 1851, shews that the indictment is insufficient by reason of the absence of an averment which is necessary to be proved cannot be supported. As it was not necessary to prove that the girl was under thirteen in order to convict the appellant under the indictment it was not necessary that the averment that she was under thirteen should be included in the indictment, nor has the appellant suffered any wrong by reason of the absence of the averment.

Appeal dismissed.

Solicitor for prosecution : *Director of Public Prosecutions.*
Solicitor for appellant : *Registrar of Court of Criminal Appeal.*

J. E. A.

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July 17.

[IN THE COURT OF APPEAL.]

PAYNE *v.* N. FORTESCUE & SONS, LIMITED.

Employer and Workman—Arbitration—Condition Precedent—Question arising as to the Liability to pay Compensation or as to the Amount or Duration of Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3.

A workman having met with an accident in the course of his employment which for the time being caused total incapacity for work, his employers paid him regularly from the date of the accident 17*s.* 6*d.* a week, being one half of his average weekly earnings. The workman applied under the Workmen's Compensation Act, 1906, to have registered a memorandum of an agreement by the employers admitting their liability, and agreeing to pay him 17*s.* 6*d.* a week. The employers opposed on the ground that they had only agreed to pay so long as their own doctor should certify that the workman was wholly incapacitated. The county court judge held that the compensation had not been settled by agreement. The workman then applied to have the compensation settled by the judge as arbitrator under the Act:—

Held, affirming the decision of the judge, that no question had arisen as to the amount or duration of the compensation which could give jurisdiction to arbitrate, though such a question might arise hereafter if and when the employers claimed to discontinue or diminish their payments.

The applicant was a navvy employed by the respondents. He strained his back in lifting a large stone on November 25, 1911. The employers from the first paid him half his wages, 17*s.* 6*d.* a week. On April 22, 1912, the workman applied to the county court at Westminster to have registered a memorandum of agreement in the form "That an agreement was come to by and between the workman of the one part and the employers of the other part whereby the employers admitted liability under the above mentioned Act and agreed to pay to the workman compensation at the rate of 17*s.* 6*d.* a week in accordance with the provisions thereof."

The employers opposed registration on the ground "that the said memorandum does not state that the weekly payments being paid in this case are only to continue so long as our doctor certifies that the workman is unable to follow his occupation."

The application to register having been dismissed, the workman then applied for an arbitration, stating that questions

had arisen as to the extent of the employers' liability and the duration of the compensation payable by them.

The full payment was still continuing.

The county court judge refused to make any order on the ground that no question had arisen as to liability or amount.

The workman appealed.

Horace Fenton, for the appellant. An employer is not entitled to impose upon a workman an obligation to submit the question of the state of his health to an arbitrator named by the employer. The learned judge was wrong in refusing to record a memorandum of the agreement: *Fox* v. *Battersea Borough Council*. (1) The ground of his decision was that there was no question between the parties within s. 1, sub-s. 3, of the Act of 1906, but the question of duration was still open. The respondents contended that payment was to continue only so long as their doctor certified that the applicant was unable to work. The workman objected to the doctor as arbitrator under Sched. II. (1.), (2.), so the dispute continued.

[FARWELL L.J. There was no agreement between you, but that does not prove that there was a dispute.]

The agreement ought to have been recorded with reference to liability and amount, omitting the question of duration, and *Phillips* v. *Vickers, Sons & Maxim* (2) ought not to have been applied. There was a sufficient dispute to give jurisdiction: *Field* v. *Lumley & Sons* (3); *Jones* v. *Great Central Ry. Co.* (4); *Sweeney* v. *Gourlay Brothers & Co. (Dundee), Ld.* (5). The last case is distinguishable. There there was nothing but payment. Here the employers contend that their own doctor is to decide how long the compensation is to continue. The claimant does not accept this contention, and there is therefore a question as to the duration of the compensation. *Higgins* v. *Paulson* (6) shews that the fact that there is a dispute as to amount at the

(1) (1911) 4 Butt. W. C. C. 261.
(2) [1912] 1 K. B. 16.
(3) [1902] 1 K. B. 47.
(4) (1906) 18 Times L. R. 65; 4 W. C. C. 23.
(5) (1906) 8 F. 965; 43 S. L. R. 690.
(6) (1912) 5 Butt. W. C. C. 66. Also reported [1912] 2 K. B. 374, but as a later stage and on a different point.

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time the application is made gives the county court jurisdiction, though the amount is settled before the hearing.

W. Ellis Hill, for the respondents, was not called upon.

COZENS-HARDY M.R. This is an appeal by a workman from two orders of a county court judge under the Workmen's Compensation Act.

The workman met with an accident on November 25, 1911. The employers admitted liability. I take that from the letter of January 7, 1912, from Mr. Duckers. It says: "I understand you have admitted liability and paid compensation at the rate of 17*s.* 6*d.* a week." That is true. They have paid compensation at that rate. But the workman applied to have a memorandum of agreement registered to that effect. The employers say "The memorandum does not state that the weekly payments being paid in this case are only to continue so long as our doctor certifies that the workman is unable to follow his occupation." That being so, the application to register the agreement which the workman brought in was dismissed. Obviously there was no agreement, and the case in this Court of *Phillips* v. *Vickers, Sons & Maxim* (1), this year, is precisely in point.

Then the workman started these proceedings for an arbitration under the Act, and says that what he wants is compensation at the rate of 17*s.* 6*d.* a week at the present time with an admission of full liability in accordance with the provisions of the Act. The employers put in their answer, and they deny that any question has arisen either as to the extent or as to the duration of their liability.

It must not be forgotten that it is not every kind of question, present or future, possible or contingent, that can be referred to arbitration under the Act. The provision for arbitration goes back to s. 1, sub-s. 3, of the Act: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act,

(1) [1912] 1 K. B. 16.

the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." The argument of Mr. Fenton really seems to me to amount to this: "The compensation which has in fact been paid is an amount which I am entitled to have paid to me so far as the Act goes during my life." The answer is, No: the Act itself contemplates that the compensation which is first given is something which may be reviewed under the machinery with which we are very familiar in this Court. It is in no sense true to say that there is any dispute as to the duration within the meaning of the words used in sub-s. 3 merely because a question may hereafter arise as to whether the compensation which is now paid may or may not have to be reviewed in accordance with the condition of health and other circumstances affecting the applicant. I think that it would be dangerous in the last degree for us to enable the workman to bring his employer into Court merely on the suggestion that at some future time there may be a question as to the amount which is payable. Of course there may be: the Act contemplates it; but that does not mean that in every such case, or in fact in the case of every application under the Act, there may be a right to go to arbitration. No employer would ever be so foolish as to admit that he is liable to pay 17*s.* 6*d.* during the rest of a man's life without any power to review. The policy of this Court, not merely under the Workmen's Compensation Act, but as regards general legislation, has been not to anticipate disputes which may never arise. The time to apply is the time when the dispute arises. When first the employers here cease to pay the 17*s.* 6*d.* (whether for good reasons or bad) there will be, or there may be, a question, a present question, to be determined by arbitration at that date; but we are not going to determine academic questions by way of prophecy.

I have dealt with this matter on what seems to me to be the plain meaning and intent of the Act of Parliament. I am strengthened in my view—I am always glad to follow the view of the Scottish Courts—by the judgment given by Lord Pearson, in which the other members of the Court concurred, in [illegible]'s

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Case. (1) That seems to me to be directly and precisely in point, and it expresses what I have endeavoured to state far better than I could attempt to do it. I desire respectfully to adopt entirely and emphatically what he says. I think that the objection taken here by the employers was valid, and that the learned county court judge was quite right in holding that there was no dispute as to duration within the meaning of the words which are used in the Act. This appeal must be dismissed.

FARWELL L.J. I am of the same opinion. Sub-s. 3 of s. 1 mentions liability to pay, amount, and duration of compensation, as the three matters in respect to which questions may arise. The first two are necessarily matters which arise at the commencement of the proceedings immediately after the accident. Liability and amount in this case are both undisputed. Therefore there is no present question at all; for duration, under Sched. I., Part I., is "during incapacity." If there is an agreement which interferes with this statutory duration, it may be registered, but in this case there was none. A dispute as to duration arises, if ever it does arise, when an application is made in accordance with the provisions of the Act to end, diminish, or amend the compensation. The Act itself points to the possibility of this question of duration arising in the future.

The whole object of the Act, as interpreted by this Court, has been to avoid these unnecessary applications which lead to expense. I will read again what the Master of the Rolls read in the course of the argument from the judgment of Stirling L.J. in *Field* v. *Longden & Sons* (2): "The Workmen's Compensation Act was intended for the benefit of workmen, not for that of the legal profession. No doubt there has unfortunately been a good deal of litigation under the Act, but I do not think we ought, unless absolutely compelled by the language used, to put such a construction upon it as to convert it into a perennial source of litigation and needless expense." I think that it would be a mere waste, and would cause useless costs and expenses, to encourage such an application as the present.

(1) 8 F. 965, 967; 43 S. L. R. 690. (2) [1902] 1 K. B. 47, 56.

KENNEDY L.J. I am of the same opinion. I think that the fair reading of sub-s. 3 of s. 1, which begins with the words "If any question arises," is that there must be a question which is, so to speak, mature in regard to one or other of the three subjects of question which are specified in that sub-section, namely, a question as to the liability or as to the amount or as to the duration of compensation. There is no question which has matured in this case at all. The most that can be said is that, when the employers and the man were discussing the question of the registration of an agreement, there was no agreement as to the future in this sense—that the employers indicated that when advised by their own medical adviser that the incapacity had ceased they should no longer continue to pay. Well and good. They are there, perhaps, saying that they shall raise a question at some time in the future when their medical adviser says "This man is no longer in the state of incapacity into which he was reduced by the accident, and as to which there is no question that you have paid him so far": but that is not a question which has arisen. It is only a question which may arise in the future from either a right or a wrong view of the employers which they say that they may then seek to enforce. I quite agree with what has been said to the effect that the principle upon which we ought to proceed is that as far as possible of confining legal operations and their costs to those cases in which there is a substantial question the decision of which affects the one party or the other. There is no such question in this case.

Appeal dismissed.

Solicitors: *J. Scott Duckers; Mackrell, Maton, Godlee & Quincey.*

J. R. B.

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[IN THE COURT OF APPEAL.]

WHITE *v.* WISEMAN.

Employer and Workman—Compensation—Basis of Calculation—"Average weekly earnings"—Days lost because the Employer had no Work for the Workman—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., s.* 2.

In calculating a workman's average weekly earnings for twelve months before an accident for the purpose of compensation under the Workmen's Compensation Act, 1906, weeks in which he had not work enough to employ him for the whole of every day must be taken into account. The average must be obtained by dividing the total wages earned by the number of working weeks in the year, after allowing for recognized holidays and interruptions by fortuitous accidents.

This was an appeal from an award of the county court judge of Birmingham under the Workmen's Compensation Act, 1906. The applicant was a workman employed by the respondent in his electro-plate works. The accident happened on December 11, 1911, and resulted in the loss of one of the applicant's eyes. The employer admitted the accident and his liability; the only dispute was as to the amount of the compensation. The employer contended that the workman was only entitled to 10*s.* a week, while the workman claimed 12*s.* The workman had been in the same employment for more than twelve months before the accident; he had been part of the time on time work at 1*l.* a week, but afterwards on piece work. His earnings during the whole twelve months amounted to 51*l.* 8*s.* 5½*d.*, or just under 1*l.* a week. But the wages earned in different weeks varied considerably, the lowest being 10*s.* 7*d.* and the highest 1*l.* 7*s.* 10*d.* The low earnings were caused by the fact that the employer had at times not work enough to keep the man fully employed. The highest earnings were made by his working overtime. It was computed that the days, or parts of days, on which the workman was not employed when added together would amount to six weeks. There were no weeks, except the holidays, in which the workman did no work. There were three recognized holidays of one week each in the year.

The case was heard on March 8, 1912. The judge reserved

judgment, and on May 8 delivered a considered judgment in which, after stating the facts and deciding that there had been no change of grade in the man's employment, on which point there was no appeal, he proceeded: "The second contention raised on behalf of the workman is a somewhat more difficult one to determine, and it is said that the question involved has not hitherto been decided. The question is whether, in order to arrive at the average rate of wages over a period of twelve months, the workman is entitled to deduct the time when he was not at work, which is not included in any recognized holidays. If he is so entitled counsel for the employer admits that compensation should be awarded at the rate of 12s. a week: and if he is not so entitled counsel for the workman admits that compensation must be awarded at the rate of 10s. a week only. There is thus a dispute as to principle only. When that is settled there is no dispute as to the rate of compensation. In my opinion the argument is correct: and in order to arrive at the average weekly earnings I ought to disregard the weeks when the workman was out of employment. The absence of work to be done was due I think to fortuitous circumstances and was in no sense a normal and recognized incident of the employment. I have arrived at this decision after perusing as carefully as I can the various decisions which were cited during the argument, though it may be that the precise question has not been decided before. I therefore award the applicant the sum of 12s. so long as his present incapacity lasts."

The employer appealed.

E. W. Cave, for the appellant. The whole question is what is meant by average weekly earnings in s. 1 (*a*) of the First Schedule to the Workmen's Compensation Act, 1906. The county court judge has disregarded the holiday weeks, and that is admittedly right, but he has also made some calculation of the number of days, or parts of days, on which the workman did no work because the employer was unable to give him any. That would necessitate a very elaborate inquiry in every case, and would not give the rate per week at which the workman was being remunerated at

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required by the first words of s. 2 (*a*) of the schedule. Lord Loreburn's judgment in *Anslow* v. *Cannock Chase Colliery Co., Ld.* (1), quoting with approval from the judgment of the Master of the Rolls in the Court below (2) the words "If work is discontinuous, that is an element which cannot be overlooked," covers the case in principle, though the exact point was not decided. The ruling of the county court judge is not consistent, for he gives the workman the benefit of the weeks when he was working overtime and omits those when he could not make full time.

J. S. Pritchett and *R. Fitz-James Sawyer*, for the respondent. The decision of the county court judge was right. The point is really covered by authority. In Fletcher Moulton L.J.'s judgment in *Perry* v. *Wright* (3) he says: "the term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident." A normal week must mean a week in which he is employed every day. The Lord Justice excepts afterwards (4) cases of employment which is by nature discontinuous, but the instances he gives of this exception are an assistant ferryman engaged only on market days or when the river was high, and a charwoman. The employment in this case was not discontinuous in its nature. The workman was employed to work every day; it was a mere accident that on some days there was no work for him to do. And in the Master of the Rolls' judgment in *Bailey* v. *G. H. Kenworthy, Ld.* (5) it is clearly laid down that "Days during which no work was done ought not to be taken into account in arriving at the average wage." And in Fletcher Moulton L.J.'s judgment in the same case he says (6) that accidental interruptions arising from breakdown of machinery ought not to be taken into account. In this case the days on which no work was done were not normal and recognized incidents in the employment. They mounted up to six weeks in the year. The judge was right in leaving these weeks, as

(1) [1909] A. C. 435, 437.
(2) [1909] 1 K. B. 352, 355.
(3) [1908] 1 K. B. 441, 456.
(4) [1908] 1 K. B. 459.
(5) [1908] 1 K. B. at p. 454.
(6) [1908] 1 K. B. at p. 466.

well as the three holiday weeks, out of consideration and dividing the total earnings by 43, which gives, approximately, 24*s.* a week.

COZENS-HARDY M.R. This is an appeal from the award of a county court judge, and it raises on the face of it a question of principle.

There was an admitted accident which happened in December, 1911. The compensation to which the workman is entitled is settled by the First Schedule, s. 1, sub-s. (*b*): "Where total or partial incapacity for work results from the injury"—here it is total at all events for a time; he has lost an eye—"a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been so long employed." That is the event which had happened here; he had been employed by the same employer for more than twelve months. Then we find in s. 2, sub-s. (*a*), "average weekly earnings"—which is the thing which we are in search of—"shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." The sub-section goes on in a proviso to deal with cases where the man has been for less than twelve months in the same employment. Sub-s. (*c*), which is the section applicable to the present case, runs: "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." Happily we have not to do here with any interruption due to illness. The man has been enjoying good health. Nor have we anything to do with such a disaster as we had to consider in one case where a canal bank burst, and the working of the mill was stopped, nor have we to do with such a case as the one where by reason of the bursting of the boilers the mill was shut up for a certain time. We are dealing here with that which, as it seems to me, is a necessary incident of most employments of this nature. The man here was working part of the time as a time worker and part of the time as a piece-worker. Roughly

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speaking, not accurately, it was half and half. We have his pay sheets for the whole twelve months. They vary very considerably. His wages in some weeks were 1*l.* 7*s.* 10*d.*, and in a good many weeks 1*l.*, and sometimes 18*s.*, and sometimes as low as 13*s.* or 14*s.*

On what principle ought the average weekly earnings over the twelve months to be arrived at? "Average" if it means anything means something between what you may consider due to overtime and what you may consider due to short time, and the average is to be ascertained, as every other average under such circumstances is, by adding them up together and taking the mean. What the learned county court judge has done—I will take his own words on this point—is this. He says that there were certain recognized holidays. We are not troubled with them: that has all been settled by the decision of the Court; but there were certain times when by reason of slackness of trade he did not earn as much as he did at other times. That remark applies both to the period when he was working as a piece-worker and to the period when he was working by time. So far as appears from the pay sheets we are not here dealing with a case in which the man went to the works and found no work to do. We are dealing with a case which seems to me to be extremely analogous to the common case which I put to the learned counsel of the cotton trade, where, as we all know, during certain times of the year or in certain particular years the mills work on short time, and at some periods of the year they work overtime. The view which the learned judge has taken is that he must disregard those weeks in which by reason of the slackness of trade there was not full employment to be obtained by the workman, whereas he must have regard to those weeks in which by reason of briskness of trade and other circumstances the man got, by way of overtime or otherwise, much higher wages. That seems to me to be wrong. That seems to me to be inconsistent with the very meaning of the words "average weekly earnings," and I think that it is inconsistent with the decisions of this Court and with at least one decision of this Court approved by the House of Lords. The judgments in *Perry* v. *Wright* (1) really conclude

(1) [1908] 1 K. B. 441.

this case. It is an incident of this employment that the man who was never discharged from work should get in some weeks more and in some weeks less pay, having regard to the state of trade and other circumstances. In my opinion all that we can do is to take the bad with the good, to add them together and to divide them. We are not here troubled with the precise amount of the divisor. It is a question of principle whether these wages are to be calculated on one footing at 24s. or on the other at 20s. In my opinion the learned county court judge has gone wrong. He has not followed what was decided by this Court in *Perry* v. *Wright* (1), and still less has he followed what was said by this Court in *Anslow* v. *Cannock Chase Colliery Co., Ld.* (2), which was expressly approved by the House of Lords on appeal.

In my opinion this appeal must be allowed and a declaration made accordingly.

FARWELL L.J. I am of the same opinion. The decision of the House of Lords, in which the Lord Chancellor quotes Cozens-Hardy M.R. with approval, covers this case completely. "In my opinion," says the Master of the Rolls, "the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked." (3) That is an element which has been completely overlooked by the learned county court judge in this case.

I only venture to add this. If the learned county court judge had taken the advice of Fletcher Moulton L.J. in *Perry* v. *Wright* (4), where he says "In doing so it is only adopting the same process that any sensible person would adopt in estimating the rate of remuneration of himself or any other person at a particular point of time," there would have been no confusion. There is no question of whether it is better for A. or B., the man or the employer. If he had adopted the process that he would adopt in his own case I do not think that the learned county court judge would have found so many difficulties as he seems to have found in this case.

(1) [1908] 1 K. B. 441.
(2) [1909] 1 K. B. 352; [1909] A. C. 435.
(3) [1909] 1 K. B. at p. 355.
(4) [1908] 1 K. B. 441, 456.

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KENNEDY L.J. I agree. These questions are not easy, but there has been a good deal of judicial opinion expressed in decisions of this Court, and there has been one most material decision in the House of Lords, and I am satisfied that we could not decide otherwise than we are deciding here without departing in principle from those decisions.

The question as I understand it as to which this appeal is brought is whether or not, in calculating this average which the statute directs the Court to arrive at in fixing the rate of compensation, the learned judge was right in disregarding, as he has done, the period during which in one week and in another the workman came to his employer's place but found that there was not sufficient work to enable him to earn that which, if he had been fully supplied with work, he would have earned. That was, as shewn by the weeks of full work, a great deal more than he earned in what I will call the lean weeks, such sums, for instance, as 25*s.* and 26*s.*, as compared with 9*s.* and 9*s.* odd. Is the workman in the calculation of the compensation entitled to say, "I was there ready to do the work and capable of doing the work, and I earned so much less because my employer happened not to have the work to do"? Or, as it is put in terms by the learned county court judge, is the tribunal entitled to disregard the weeks when the workman was out of employment through no fault of his own, in order to arrive at the proper division of the total wages, or not? With great respect I do not think that that is a perfectly correct statement of the facts, because the list shews that, except for three weeks which were, as I understand it, holiday weeks, there were no working weeks, if I might call them so, in the trade when this man was entirely out of employment. He earned less in the number of weeks scattered over the twelve months' period because of want of work which he could do. With that qualification, taking the position put by the learned judge, he proceeds to say, "This absence of work was due, I think, to fortuitous circumstances and was in no sense a normal and recognized incident of the employment." There I differ from him. It is the ordinary case of any employer who from time to time has more work or less work to

give the workmen who attend his factory or his shop, and there was nothing special, there was nothing fortuitous, in the proper sense of the term and according to the definition which appears, I think, in more than one judgment, but which certainly appears in the judgment of Fletcher Moulton L.J., and in the general statement of the law which precedes that judgment in the cases which are grouped together under the name of *Perry* v. *Wright*. (1) Dealing with the question of the limitation as to time and the divisor in respect of time which should be applied in getting at the average for a week he says: "But I should arrive at a different conclusion if the limitation to the time worked arose from the nature of the employment itself." (2) Then he proceeds to refer to discontinuous employment. Just as the charwoman and the ferryman, which he gives as illustrations, are dealt with as persons whose normal week is one in which they are employed for only two or three days and therefore earn money for only two or three days, so here it is an incident as it appears to me of a normal week that a workman should find more work or less work as his employer has it for him to do, and, if that is so, the learned county court judge is not justified in saying "I will look all through the period and make allowance at some rate in calculating the average for the times when he got less work than he did in other weeks." I see nothing special or fortuitous in the circumstances, or that it was not a normal and recognised incident of the employment. I take it to be a normal and recognized incident of most employments that a man takes the risk of getting more or less work as his employer has it. It is not the case of anything sudden or unexpected. The employer of the bricklayer, to whom Farwell L.J. in the course of the argument aptly referred, cannot find work for all the men at all times to the same extent; he must in certain months of the year have less work to apportion amongst his workmen, but those weeks in which less is apportioned are normal weeks in the employment, normal weeks in the sense in which the word appears to have come into use in discussing these questions. I do not think that it is a word to be found in the text of the Act

(1) [1908] 1 K. B. 441, 456. (2) [1908] 1 K. B. at p. 459.

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itself, but it usefully indicates that which we have got to get at in endeavouring to calculate the average weekly remuneration of the applicant for compensation. I think that the error of the judgment of the learned county court judge lies, to put it in one sentence, in treating as something outside the normal incidents of the work the fact that there is less to divide in one week than in another in the ordinary way of business.

By consent the Court fixed the compensation at 10*s.* a week instead of sending the case back to the county court judge.

Appeal allowed.

Solicitors: *W. Hurd & Son, for Wm. Shakespeare & Co., Birmingham; Herbert Oppenheimer, for W. J. Rabnett, Birmingham.*

J. R. B.

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July 11, 22.

[IN THE COURT OF APPEAL.]

EDGE *v.* J. GORTON, LIMITED.

Employer and Workman—Compensation—Basis of Calculation—"Average Weekly Earnings"—Casual Employment—"Grade"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

A workman was first employed by the respondents on May 19, 1911, as a casual carter, his duty being to drive a one-horse cart. On July 27, 1911, he died from the effects of an accident arising out of and in the course of his employment. At the date of the accident and for about a fortnight before he had been working for the respondents as a casual teamster and receiving a higher wage. Upon an application by the dependants of the deceased for compensation under the Workmen's Compensation Act, 1906, the county court judge found as a fact that the workman had only been employed temporarily and casually as a teamster, and in calculating the "average weekly earnings" he took into account the total amount of wages earned by the workman, whether as a casual carter or as a casual teamster, from May 19 until his death:—

Held, on appeal, that there had been no change of "grade" in the employment of the workman, and that the method of calculation adopted by the county court judge was right.

Dobson v. *British Oil and Cake Mills*, (1912) 5 Butt. W. C. C. 405, followed.

THIS was an appeal from an award of the judge of the Salford County Court upon an arbitration under the Workmen's Compensation Act, 1906.

The workman was first employed by the respondents as a casual carter on May 19, 1911, his duty being to drive a one-horse cart. On July 14 he was temporarily employed by the respondents as a casual teamster at a higher wage, and continued in that employment until July 26, when he met with an accident arising out of and in the course of his employment, from the effects of which he died on July 27.

Upon an application by the dependants of the deceased for compensation, the county court judge found as a fact that the deceased was only employed temporarily and casually as a teamster while the respondents were on the look out for a regular man, and in calculating the "average weekly earnings" for the purpose of assessing the amount of compensation payable he took into account the total amount of wages earned by the man, whether as a casual carter or as a casual teamster, from May 19 until the date of his death.

The applicants appealed on the ground that the workman had changed his "grade" and the "average weekly earnings" ought to be calculated on the higher grade in which he was employed at the date of the accident.

Fenton, for the appellants. The county court judge has proceeded on the wrong principle in computing the compensation. He ought to have ascertained whether the employment of the workman at the time of the accident was a distinct "grade" and what were the average weekly earnings in that grade. The workman had entered upon a fresh employment in a higher grade, and the calculation ought to have been upon the higher grade only. He was at the time of the accident, though not regularly, earning the higher wages; his earnings in the lower grade ought not to have been regarded: *Perry* v. *Wright* (1): *Babcock & Wilcox, Ld.* v. *Young*. (2)

Shakespeare, for the respondents. The authorities cited are not relevant, having regard to the arbitrator's findings of fact. There was no change in the man's grade at all as there was in *Babcock & Wilcox, Ld.* v. *Young*. (2) He was casually employed throughout and never acquired a "grade" at all. This case cannot be

(1) [1908] 1 K. B. 441, 456. (2) (1911) 4 Butt. W. C. C. 367.

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distinguished from *Dobson* v. *British Oil and Cake Mills.* (1) Moreover the facts of which the Court may take cognizance under Sched. I., s. 2, of the Act of 1906 are only a guide and not a fetter: *Perry* v. *Wright.* (2) There is nothing to oblige the county court judge to adopt any particular course: *Perry* v. *Wright.* (3) On both these grounds this appeal should fail.

Fenton in reply.

Cur. adv. vult.

July 22. COZENS-HARDY M.R. This appeal raises a curious question as to the true meaning of "average weekly earnings." The material facts may be shortly stated. Edge was taken on by the respondents as a casual carter on May 19, 1911. His duty was to drive a one-horse cart or lorry. His death took place on July 27, by reason of an accident arising out of and in the course of his employment. For about ten days or a fortnight he had been working as a casual teamster driving two horses and receiving a somewhat larger pay. The problem is to ascertain the amount of 156 times his average weekly earnings during the period of his actual employment under the same employer. Sched. I., s. 2, contains directions as to the mode in which this problem is to be worked out. This section was elaborately considered by this Court in *Perry* v. *Wright.* (4) It is not necessary to repeat what was there said by Fletcher Moulton L.J. and by me. It was decided in the Court of Session in *Babcock & Wilcox, Ld.* v. *Young* (5), following *Perry* v. *Wright* (4), that the compensation must be based on the wages the workman was earning in the grade of employment in which he was when he met with the accident, and that the arbitrator could not competently take into account the deceased man's wages in an earlier grade. In the recent case of *Dobson* v. *British Oil and Cake Mills* (1) in this Court the question of the meaning of "average weekly earnings" again came up for decision. There a man, who had been a grinder for twenty-eight years, left his employers, and some months afterwards returned to work with the same employers, partly as a day labourer and partly as a

(1) (1912) 5 Butt. W. C. C. 405.
(2) [1908] 1 K. B. at pp. 446, 458.
(3) Ibid. at p. 452.
(4) [1908] 1 K. B. 441.
(5) 4 Butt. W. C. C. 367.

grinder, when he took the place of a grinder who was ill, with the full knowledge and consent of his employers. The county court judge added together the total wages earned during the five weeks, partly as a grinder and partly as a day labourer, and this Court held that the county court judge had not in any way misdirected himself, but had done exactly what the Act of Parliament had told him to do. There was no change from one grade to another. He was a man who worked sometimes as a day labourer and sometimes as a grinder. There is nothing inconsistent in this decision either with *Perry* v. *Wright* (1) or *Babcock & Wilcox, Ld.* v. *Young*. (2) In the present case the learned county court judge has added up the total amount of wages got from May 19 to the death whether earned as a casual carter or a casual teamster, and I think there is no misdirection. There was no change of grade. According to the evidence of the respondents, which the learned judge said he accepted, the deceased was only employed temporarily and casually as a teamster while the respondents were on the look out for a regular man. He was never a regular carter or a regular teamster. This being so, there was no change of grade. Edge was merely a casual labourer occupied sometimes as a carter and sometimes as a teamster. This being so, I think the decision was justified, and the appeal must be dismissed.

I only wish to add that in my view employment for a few weeks as bricklayer's labourer, followed by a fresh employment in a different grade as bricklayer, would not justify the adding together all the wages received in both grades. I do not think that the county court judge has an absolutely free hand in deciding what is no doubt a question of fact, namely, what are the average weekly earnings. He must not fail to follow the particular directions in the schedule, although where there are no directions he must estimate as best he can. The appeal must be dismissed with costs.

FARWELL, L.J. I am of opinion that the award in this case is a mere finding of fact: that the learned judge has in no way misdirected himself, and that there is no appeal. The workman

(1) [1908] 1 K. B. 441. (2) 4 Butt. W. C. C. 367.

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Farwell L.J.

had been employed as a carter from May 19, 1911, till July 14, 1911, and had been from that day and was at the date of the accident, July 26, 1911, temporarily employed as a teamsman : the finding is that the workman was "only employed temporarily and casually as a teamsman while the respondents were on the look out for a regular man."

The case therefore falls within the provision in Sched. I., s. 2 (*a*). Now the construction of this provision has been determined by this Court in *Perry* v. *Wright*. (1) The county court judge is to do the best he can and "may have regard to the average weekly amount which during the preceding twelve months was being earned by a person in the same grade," which by s. 2 (*c*) is defined to mean "grade" at the date of the accident. But the county court judge is not bound to adopt this, or if he does, to adopt it to the exclusion of all other means : it is only to be used as a guide if and so far as he thinks necessary, and if he finds other guides, such as personal unfitness in the man or recent employment at a higher or lower rate (not "grade") at other times, he is at liberty to take them into consideration also. It is left to the county court judge to do the best he can with such materials as he is allowed to use, and if he does not transgress those limits, the mode in which he uses them is for him, not for us: see *Perry* v. *Wright*. (2) I am unable to distinguish this case from *Dobson* v. *British Oil and Cake Mills* (3), which binds us even if I did not agree with it, as I do.

KENNEDY L.J. The question in this case is whether or not the learned county court judge has misdirected himself in assessing the compensation due to the dependants of the deceased workman upon a method which takes into account the earnings of the deceased in the employment of the respondents, not merely as a casual teamsman from July 14 to July 26, when the accident happened which resulted in his death, but also during an earlier period of several weeks as a carter. The appellants contend that the average earnings should be calculated only upon the basis of his employment as a casual

(1) [1908] 1 K. B. 441. (2) [1908] 1 K. B. at pp. 454, 455.
(3) 5 Butt. W. C. C. 405.

teamsman. I do not think that, if the fact was that the deceased had been employed, even for a brief period before his death, as a person in the "grade" of a teamsman, the learned county court judge would have been justified in regarding the earlier employment of the deceased as a carter—the "grade" of a person, as I understand the evidence, who is employed to drive one horse. I agree with the Master of the Rolls upon this point. And further I am not prepared to say that a casual teamsman as distinguished from a casual carter might not constitute a "grade" of employment. Fletcher Moulton L.J. in *Perry* v. *Wright* (1) speaks of the "grade" of a casual dock labourer. But the learned county court judge has in his judgment in this case expressly found facts which, as I understand the finding, render that which I will call the "grade" principle inapplicable. He states: "I accepted the respondents' version and found that the deceased was only employed temporarily and casually as a teamsman while the respondents were on the look out for a regular man." It appears to me that these words exclude the notion of "grade" as applicable to the deceased's actual employment, and mean, in effect, that the deceased's employment at the time of his death was really that of a workman who at that time had a temporary job as a teamsman, but who cannot properly be treated as having definitely reached a more highly paid grade as a teamsman. He was, in truth, a casual workman earning wages one day as carter and another day as a teamsman, and during the period between July 14 and July 26 was only temporarily, and because it happened to suit the respondents, performing the duties and receiving the wages of a teamsman. For these reasons I concur with the other members of this Court in holding that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *A. E. Fenton, for T. A. Needham, Manchester; Busk, Mellor & Co., for Payne, Galloway & Co., Manchester.*

(1) [1908] 1 K. B. at pp. 462, 463.

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1912
July 18, 22.

[IN THE COURT OF APPEAL.]

JURY *v.* OWNERS OF S.S. ATLANTA.

Employer and Workman—Compensation — Basis of Calculation—"Average Weekly Earnings" — "Grade" — Workmen's Compensation Act, 1906 (6 *Edw. 7, c.* 58), *Sched. I., ss.* 1, 2.

A sailor who had for some time been employed in various capacities and at various rates of wages by the appellants, who were shipowners, on February 3, 1912, was taken on temporarily as a mate in the place of his son, who had met with an accident. On February 6, while thus employed as mate on board the appellants' vessel, he was drowned. Upon an application for compensation by his dependants, the county court judge held that the man's "grade" at the time of his death was that of a mate, and he assessed the compensation accordingly:—

Held, on appeal, that the question of what grade the man occupied was not one merely of fact upon which the decision of the county court judge was final, but it was a question of law whether, upon the facts as found, the workman occupied a grade within Sched. I., ss. 1 and 2, of the Workmen's Compensation Act, 1906.

Held, also, that the workman was at the time of his death temporarily acting as a mate, and that the county court judge must ascertain as best he could the "average weekly earnings" of the man, taking into consideration the various rates of his wages.

This was an appeal from an award of the judge of the Cardiff County Court on an arbitration under the Workmen's Compensation Act, 1906.

The application for compensation was by the dependants of F. Jury, who met his death while in the service of the appellants. For some time prior to 1910 Jury had been employed as mate on one of the appellants' vessels. In that year he met with an accident which disabled him and in respect of which he received compensation. In March, 1910, he was taken on by the appellants as a watchman at 1*l.* per week, a position which he held until October, 1910, when he worked for the same employers as a "hobbler" at 12*s.* or 14*s.* a week. At this time his son was mate on the appellants' vessel "*The Atlanta*." The son met with an accident on February 3, 1912, and the father (the deceased) was taken on temporarily in his place until the son should recover. On February 6, 1912, the vessel foundered, and Jury was drowned. The county court judge held that the man's

"grade" at the time of his death was that of mate and assessed the compensation on that footing.

The employers appealed.

Hume Williams, K.C., and *A. T. Jones*, for the appellants. The workman in this case did not occupy the grade of mate, and the county court judge has taken a wrong view of the law in holding that in assessing the compensation he is only entitled to take into account the average earnings of a man in that grade: *Dobson* v. *British Oil and Cake Mills*. (1) When this case was before the arbitrator *Dobson* v. *British Oil and Cake Mills* (1) had not been reported, and he followed *Babcock & Wilcox, Ld.* v. *Young*. (2) The present case is nearer to *Dobson* v. *British Oil and Cake Mills*. (1)

J. Sankey, K.C., and *A. Parsons*, for the respondents. The question of "grade" is really one of fact for the county court judge, and he has found that the man's grade at the time of his death was that of mate. If a workman has been promoted by his employer to a higher grade, and is in that grade at the time of the accident, his earnings when in the lower grade are not to be taken into consideration in computing his "average weekly earnings": *Perry* v. *Wright*. (3)

Hume Williams, K.C., in reply.

Cur. adv. vult.

July 22. COZENS-HARDY M.R. This appeal also raises a question as to the meaning of the term "average weekly earnings." Frank Jury had been for some time prior to 1910 employed as a mate. He met with an accident which disabled him. In March, 1910, he was taken on as a watchman at 1*l.* per week, a position which he held until October 15, 1910, when he was taken on as a "hobbler." At this time his son was mate on the *Atlanta*. The son met with a slight accident on February 3, 1912, and the father, who, as I have said, had some years before acted as mate, was taken on in the son's place until he recovered. He was not taken on for a permanent job, but only as a stop-gap until his son should recover. The evidence on this point is clear

(1) (1912) 5 Butt. W. C. C. 405. (2) (1911) 4 Butt. W. C. C. 367.
(3) [1908] 1 K. B. 441, 457.

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and uncontradicted. On February 6 the vessel foundered, and the father was drowned. The learned county court judge has held that his "grade" at the time of the death was that of mate, and has assessed compensation on that footing. In my opinion it is not correct to say that this is a matter of fact upon which the decision of the county court judge is final. It is no doubt for him to find the facts, as to which in the present case there is no dispute, but it is for this Court to say whether, upon the facts so found, the deceased man occupied a "grade" within the meaning of the Act. In my opinion he did not occupy the "grade" of a mate. He was merely a locum tenens or stop-gap, put to discharge temporarily the duties of his son. If, in the temporary absence of a shepherd through illness, an ordinary farm labourer is told by the foreman to discharge the duties of shepherd, and receives the wages of a shepherd for three or four days, there has been no such change of position as to constitute a fresh grade. The man is still a farm labourer. He is not in truth commencing a fresh employment. No doubt there are many grades which are temporary, in the sense that the employment may be terminated at a week's notice, but such employments are, in the contemplation of both parties, not casual, but are intended to continue subject to a week's notice, unless something unexpected happens. I think the true view is that the deceased man was at his death a "hobbler," though he was temporarily and casually discharging the duties of mate. This being so, it will be necessary that the county court judge should ascertain as best he can the average weekly earnings on that footing. The appeal must be allowed.

FARWELL L.J. The county court judge says that at the time of his death the grade of the deceased was that of mate, and it is argued that this is a question of fact and therefore not open to appeal. But the construction and meaning of the word "grade" in the Act is a question of law. There is no dispute about the facts, and the two questions for us are: Do the facts shew the existence of any grade at all? And even if they do, is it not "impracticable" to compute the rate of remuneration within the meaning of Sched. I., s. 2 (*a*)? If the deceased had a grade

at all, I find some difficulty in seeing how it can be anything but that of mate, and this, indeed, is admitted by the respondents' answer: but I doubt if he had a "grade" within the meaning of the Act. If he had, then I think that regard must be had to the terms of his employment, which is simply as a stop-gap to keep the place open for his son during the latter's temporary incapacity. The word "impracticable" in the Act must mean impracticable to arrive at a fair computation; for it is never impracticable to make some arithmetical calculation with some result, but if, as here, it would be very unfair, it becomes impracticable to reckon the deceased's earnings on the basis of mate: regard should therefore be had to the whole of his earnings during the twelve months preceding his death, in whatever capacity he was from time to time employed.

This is, in my opinion, in accordance with the decision of this Court in *Dobson* v. *British Oil and Cake Mills* (1), and I do not think it is inconsistent with *Babcock & Wilcox, Ltd.* v. *Young* (2), where there was no question of any peculiarity in the terms of the employment, but a mere change from one grade to another. As the Master of the Rolls says in *Perry* v. *Wright* (3), "Any step up or step down from one grade to another is to be regarded as commencing a fresh employment." But the temporary use of the father in this case to take the son's place as mate cannot be regarded as a fresh employment: it was casual, temporary, and uncertain. If it is to be regarded as a fresh employment, the whole rate of remuneration must be based upon it; but the paramount intention of the Act is to compute "in the manner best calculated to give the rate per week at which the workman was being remunerated." It is clear that to take his position of mate at the date of the death as the basis would not give this. It follows, therefore, that this cannot be the right course to adopt.

Kennedy L.J. The deceased workman in this case for some years before his death by the foundering of the steamship *Atlanta* on February 6, 1912, had been earning his livelihood in work of various kinds for the appellants in connection with vessels.

(1) 5 Butt. W. C. C. 405. (2) 4 Butt. W. C. C. 367.
(3) [1908] 1 K. B. at p. 453.

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In December, 1908, he was serving on board the appellants' vessel *Eliza*, of a similar class to the *Atlanta*, and sustained an injury in the hand for which he received compensation under the Workmen's Compensation Act. Between March 12 and October 15, 1910, he was employed as a watchman at the salary of 1*l.* a week. Between October 15, 1910, and February 2, 1912, he worked as a "hobbler," i.e., in mooring and unmooring vessels in dock, not only for the appellants, at wages which are stated, so far as he was paid by the appellants, to have ranged from 12*s.* to 14*s.* a week. Whether he sometimes also did hobbling work for others than the appellants does not, I think, clearly appear. On February 3, 1912, his son, who was serving on board the *Atlanta* as mate, was injured, and the deceased was taken on as mate in his place temporarily and until such time as his son's injury should have healed. Three days later the *Atlanta* foundered, and he lost his life by drowning. His dependants claim compensation, and the question is as to the proper method of assessing the compensation.

The learned county court judge has assessed it upon the basis of the earnings of the deceased as a mate, treating the deceased as having the grade of a mate at the time of his death within the meaning of the term "grade" in Sched. I., ss. 1 and 2. He has taken the average wage of such a person according to the evidence adduced before him. The appellants appeal against that decision. They argue that it is incorrect to treat the temporary and, it may be described, casual employment of the deceased as a mate on board the *Atlanta* during the son's incapacity as a "grade"; and that, the duty of the arbitrator being, in the governing words of Sched. I., s. 2(*a*), "to compute the earnings in such manner as is best calculated to give the rate per week at which the workman was being remunerated," it is not right to take as the sole basis the chance and expressly temporary employment as a stop-gap, and to exclude all consideration of his previous remuneration. I agree. In this particular case the inclusion of the casual employment may go to diminish the compensation, just as, in another case where a man has on an emergency and temporarily accepted a less remunerative class of work, it may enhance the compensation

to bring into the calculation of average weekly earnings an earlier employment at a higher rate of pay: see *Dobson* v. *British Oil and Cake Mills*. (1) But unless the employment at the time of the accident denotes a grade in that which the Master of the Rolls in *Perry* v. *Wright* (2) has described as the "industrial hierarchy," it cannot, I think, be right in principle to look solely to the earnings at the moment of the accident. "Grade," I think, implies an element of permanence, not indeed in the service of the particular employer, for that may be, by custom or by contract, terminable, as, for example, a weekly or a monthly hiring, but in the character of the work by which the workman is normally and in practice earning his living.

In holding that we must differ from the learned county court judge in the present case we are not differing from him on a judgment of fact. We are holding that in adjudging that "the grade was changed" he was not applying the term "grade" as the statute, correctly interpreted, intended it to be applied. I agree with the members of this Court in holding that the case must go back to the learned county court judge for the assessment of the average earnings on the wider basis.

Appeal allowed.

Solicitors: *Smith, Rundell & Dods, for Harold Lloyd & Cross, Cardiff; F. J. Lean, Cardiff.*

(1) 5 Butt. W. C. C. 405. (2) [1908] 1 K. B. at p. 453.

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[IN THE COURT OF APPEAL.]

GARNANT ANTHRACITE COLLIERIES, LIMITED *v.* REES.

Employer and Workman—Compensation—Industrial Disease—Increased Susceptibility—Nystagmus — Sequela — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1; *Sched. III.*

On application by employers for a review of a weekly payment under the Workmen's Compensation Act, 1906, it appeared that the compensation had been awarded in respect of an industrial disease, and the county court judge held that although the applicant was no longer suffering from the disease he was unable to do his former work because of his increased susceptibility to the disease owing to his first attack, and that he was therefore still entitled to compensation :—

Held, on this finding, that the effects of the accident, that is of the industrial disease, still continued to exist, and the applicant was entitled to compensation.

Appeal from an award of the judge of the Llandilofawr County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On December 6, 1910, the certifying surgeon appointed under the Factory and Workshop Act, 1901, certified that William Rees, a collier, was suffering from nystagmus, a disease coming within s. 8 of the Workmen's Compensation Act, 1906, and was thereby disabled from earning full wages at the work at which he was employed. Rees applied for arbitration, and on September 19, 1911, the county court judge by consent of all parties made an award that the employers, the Garnant Anthracite Collieries, Limited, should pay to him the weekly sum of 1*l.* from November, 1910, to July, 1911, and from that date the weekly sum of 13*s.* 6½*d.*, as compensation in respect of the said disease, being half the difference between the applicant's old earnings, namely, 2*l.* 13*s.* 1*d.*, and his earnings of 1*l.* 6*s.* at light work during total or partial incapacity, or until the same should be ended, diminished, increased, or redeemed. On March 27, 1912, the company applied for a review and termination or diminution of the weekly payment on the ground of the recovery or partial recovery of Rees from the nystagmus.

Nystagmus is a disease of the eyes caused by working by

artificial light. At the arbitration evidence was given by a medical witness that he had examined Rees twice and found no traces of nystagmus; that he was susceptible to a second attack if he went underground, and that another attack would probably follow. The witness was not prepared to say one way or the other as to whether a first attack would make him more susceptible than before. Another doctor said that he had examined Rees and could find no trace of nystagmus; but he was suffering from heart disease which would unfit him for underground work.

On behalf of Rees a medical witness gave evidence that he had seen Rees on March 10, May 24, and November 27, 1911, and April 10, 1912; that he found no trace of nystagmus on May 24, 1911; that on April 10, 1912, he found an unsteadiness in the eye where nystagmus had occurred, and the muscles had not recovered their strength; that he would not advise Rees to go underground, and would not allow him to do so if he were his patient; that the susceptibility was increased if he had once had nystagmus; the witness had had experience of second attacks after a man had returned to do collier's work, and this confirmed his view; that Rees could do his present work, and, apart from the susceptibility to nystagmus, could return to work.

The learned judge held that Rees was not now suffering from nystagmus; that he was unable to do his former work; that his tendency to nystagmus was due to the previous attack of the disease, and that there was an increased susceptibility to nystagmus; and he dismissed the employers' application.

The employers appealed on the grounds that there was no evidence to support the finding that Rees suffered from increased susceptibility to nystagmus from his former attack or that he was incapacitated by such increased susceptibility, and that the judge was wrong in law in holding that where, after an attack of nystagmus, there survived in the workman, by reason of the former attack, an increased susceptibility to further attack, rendering his former employment unsuitable for him, the workman was entitled to compensation.

George J. Scott, for the appellants. It cannot be that if a workman contracts an industrial disease he is in every case

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permanently incapacitated and is permanently entitled to compensation to the extent of the difference between the wages he can earn by working above ground and the higher wages he formerly earned below the surface. Sched. III. of the Workmen's Compensation Act, 1906, has carefully guarded against such a holding, for it distinguishes between two classes of diseases, namely, those with sequelæ and those without sequelæ. Nystagmus is described as a disease without sequelæ, and the evidence shews that all traces of it had disappeared long ago, so there was nothing left in respect of which Rees could be entitled to compensation.

At most the evidence in this case shews that there was a greater susceptibility to the disease after the first attack. That is not enough to bring this case within the expressions of opinion in *Jones* v. *New Brynmally Colliery Co., Ld.* (1), and the appellants contend that the decision in that case should be followed and this appeal allowed. The medical evidence contains only expressions of opinion, not statements of fact. Where the disease is one which has no sequelæ employers are only liable to compensate for the disease itself.

Sankey, K.C., and *Meager*, for the workman, were not called upon.

COZENS-HARDY M.R. I think this case is really covered by the decision of this Court in the case of *Jones* v. *New Brynmally Colliery Co., Ld.* (1) That was a case in which the workman suffered from nystagmus and was paid compensation, and he found he could not get permanent employment in the pit afterwards, although the immediate effect of the nystagmus had gone, but no medical evidence was called to prove that the first attack of the disease had rendered him more susceptible to nystagmus than he was before the attack. All three members of the Court on that occasion pointed out that the burden of proof had not been established. "There was no evidence that" the workman "was rendered by reason of the past nystagmus liable to the recurrence of nystagmus, and unless that can be made out it seems to me that the applicant must fail." (1)

(1) (1912) 5 Butt. W. C. C. 375.

That is what I said. Fletcher Moulton L.J. said nearly the same: "If the fact that he has had nystagmus is a warning and that is why colliery owners will not send him down, they are under no liability in respect of that. But if the fact that he has had nystagmus leaves behind it an increased susceptibility to nystagmus due to the previous attack and it is because of that that they will not send him down, then the effect of the accident has not ceased and his loss of underground work is due to a consequence of the accident, and in that case they would be liable and he would be entitled to compensation." (1) Buckley L.J. says exactly the same. The county court judge "does not find—which I think is the critical fact to be found—that if he went back underground the recurrence would be attributable to the previous attack of nystagmus." (1) Here there was medical evidence upon which the learned county court judge was entitled to find, as he did, that there was an increased susceptibility to nystagmus. A very important matter which was lacking in the case of *Jones* v. *New Brynmally Colliery Co., Ld.* (1) is supplied here. It is not for me to say whether the learned county court judge was right or not in the view which he took of conflicting medical evidence: he was entitled to take the view which he did, and although it was merely evidence of opinion, medical evidence, like other expert evidence of this kind, must be merely evidence of opinion. I think, therefore, upon that ground this appeal fails, and the learned judge's award ought to stand. But then it was said that this is no doubt an industrial disease, but that it is unlike some of the industrial diseases which are described as producing poisoning and its sequelæ. There is no question of sequelæ here, and nobody alleges that there are sequelæ here. The simple question is, have the effects of the accident, that is of the industrial disease, been got rid of and disappeared? The learned judge has found that they have not. He has found the susceptibility to nystagmus was increased, and that being so, it seems to me we cannot interfere with the award, and that the appeal must be dismissed with costs.

(1) 3 Butt. W. C. C. 375.

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FARWELL L.J. I agree. On the first point the case is clearly within *Jones* v. *New Brynmally Colliery Co., Ld.* (1), and the second point which Mr. Scott has suggested I think ought not to prevail. "Sequela" is a technical term. We had a case before us in which a man died from disease of the kidneys. The evidence shewed that it might have been a sequela of lead poisoning, or excessive indulgence in alcohol. In that sense, of course, "sequela" is well understood, but if a man loses his eye by reason of something of this sort, that is the result of the accident or the disease, and not a sequela at all in the ordinary sense; and that, I think, was the basis of the decision here. The man is in effect not a one-eyed man, but less good as a two-eyed man than he was before, and it is on that ground that compensation was given.

KENNEDY L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Smiles & Co., for Gee & Edwards, Swansea; John T. Lewis, for Randell, Saunders & Randell, Swansea and Llanelly.*

(1) 5 Butt., W. C. C. 375.

H. C. R.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

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TRUMAN, HANBURY, BUXTON & CO., LIMITED AND ANOTHER *v.* COMMISSIONERS OF INLAND REVENUE.

April 17, 18, 19, 22.

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June 6, 7; *July* 20.

Revenue — Retailer's On-Licence — Duty — Annual Licence Value — Annual Value — Basis of Calculation — Tied House — Brewers' Profits — Deduction — "Increased Value" from Sale of Non-Intoxicants — Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, c. 8), *ss.* 43, 44, *sub-s.* 2—*Revenue Act*, 1911 (1 *Geo.* 5, *c.* 2), *s.* 8.

By s. 43 of the Finance (1909-10) Act, 1910, there shall be charged and paid on the licences for the sale of intoxicating liquor specified in the First Schedule to the Act the duties of excise specified in that schedule. In cases within clause 3 of the "Provisions applicable to Retailers' On-Licences" in the First Schedule the duty is an amount equal to one-third of the annual licence value as certified for the purposes of the Act.

By s. 44, sub-s. 2, the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed exceeds the annual value which the premises would bear if they were not licensed premises, those values being calculated on the same basis as that on which the amount to be paid as compensation under s. 2 of the Licensing Act, 1904, is calculated in default of agreement.

By s. 8, sub-s. 1, of the Revenue Act, 1911, the annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value shall be, in England, the inhabited house duty value if there is such a value applicable:—

Held by the Court of Appeal, affirming the decision of Hamilton J., that in calculating the annual licence value of premises for the purposes of s. 44, sub-s. 2, the inhabited house duty value cannot be taken to be the annual value of the premises as licensed premises. The said annual value must be ascertained in accordance with the principles laid down in *Ashby's Cobham Brewery Co.'s Case* [1906] 2 K. B. 754; and, therefore, in the case of a tied house, the annual value includes such a sum as the brewers would be willing to pay in order to obtain the profits to be derived in one year from the supply of their beer to the tenant for sale on the premises.

By the last paragraph of sub-s. 2 of s. 44 it is provided that in estimating (for the purpose of the annual licence value) the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration:—

Held by the Court of Appeal, affirming the decision of Hamilton J., that this provision is not confined to hotels and premises of like

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generis, but applies to all licensed premises substantially used for purposes other than the sale of intoxicating liquor.

Held, also, by the Court of Appeal (Kennedy L.J. dissenting), reversing the decision of Hamilton J., that the words "increased value" mean the whole value arising from the net profits obtained otherwise than from the sale of intoxicants, and not only such value arising from the extra profit, over and above the profit ordinarily made in the same business on unlicensed premises, as results from carrying on that business on licensed premises.

APPEAL under s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, from the Commissioners of Inland Revenue.

The petition of appeal was as follows:—

1. The petitioners Truman, Hanbury, Buxton & Co., Limited, are a limited company having their registered office at 91, Brick Lane, Spitalfields, in the county of London, and are the registered owners of certain premises known as the Eagle public-house, situate in the metropolitan borough of St. Pancras in the said county; the petitioner Edwin Warden is the tenant of the said premises and the holder of the licence hereinafter described in respect thereof. The said petitioners are persons aggrieved by the decisions of the Commissioners of Inland Revenue embodied in the certificate hereinafter specified and bearing date July 21, 1911, which was issued in substitution for a previous certificate hereinafter specified and bearing date March 2, 1911.

2. There was at all material times in force in respect of the said premises a publican's licence or retailer's on-licence for spirits within the meaning of Part II. of the Finance (1909-10) Act, 1910.

3. The petitioner Edwin Warden holds the said premises under a lease from the petitioners Truman, Hanbury, Buxton & Co., Limited, and is bound by a covenant in the said lease to purchase from the last-named petitioners all malt liquors required by him for sale on the said premises, but is not bound to purchase any other liquor or commodity from the said last-named petitioners.

4. A considerable portion of the profits derived by carrying on trade on the said premises is derived from the sale of commodities other than intoxicating liquor.

5. The Commissioners of Inland Revenue, purporting to act under s. 44, subs. 2, of the Finance (1909-10) Act, 1910, by a certificate bearing date March 2, 1911, fixed and certified the following sums :—

As the annual value of the premises as licensed premises	1495*l.*
As the annual value which the premises would bear if not licensed	250*l.*
As the annual licence value of the premises (being the difference between the two last-mentioned sums)	1245*l.*

6. The petitioners being aggrieved by the said certificate duly delivered to the Commissioners on May 24, 1911, a written statement of the grounds of their appeal against the same.

7. The Commissioners by a letter dated June 15, 1911, and addressed to the petitioner Edwin Warden, intimated that they were prepared to amend their certificate by the insertion of the figures specified in paragraph 8 hereof.

8. Instead of amending the said certificate the Commissioners afterwards by a new certificate dated July 21, 1911, fixed and certified the following sums (being the sums specified in the letter of June 15, 1911), namely :—

As the annual value of the premises as licensed premises	1503*l.*
As the annual value which the premises would bear if not licensed	300*l.*
As the annual licence value of the premises	1203*l.*

9. The said last-mentioned certificate was issued and transmitted to the petitioners on July 26, 1911.

10. Since the issue of the said last-mentioned certificate the petitioners, being desirous of appealing against the decision of the Commissioners embodied therein, have delivered a statement of the grounds of their appeal against the same.

11. The gross value of the premises appearing in the valuation list for the time being in force for the said metropolitan borough is 997*l.*, and by virtue of s. 45 of the Valuation (Metropolis) Act, 1869, the said sum of 997*l.* is the value of the said premises for the purpose of inhabited house duty. In fixing such value

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regard has been had to any decrease in annual value resulting from an increase in the licence duty under the Finance (1909-10) Act, 1910, as amended by the Revenue Act, 1911. The premises to which the said value is attached for the purposes of inhabited house duty correspond with the premises the annual value of which is required for the purpose of the charge of the duty on the licence.

12. By virtue of s. 8, sub-s. 1 (*a*), of the Revenue Act, 1911, the annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value shall be the inhabited house duty value if there is such a value applicable, and by s. 8, sub-s. 1, the value as adopted for the purposes of inhabited house duty is deemed to be applicable if the premises to which a value is attached for the purpose of the last-mentioned duty correspond with the premises the annual value of which is required for the purpose of the charge of the duty on the licence.

13. By virtue of s. 43 of the Finance (1909-10) Act, 1910, the duties of excise specified in the First Schedule to that Act shall be charged, levied and paid on the licences for the sale of intoxicating liquor specified in such schedule. By the said First Schedule, C, scale 1, the duty on a publican's licence is a duty equal to half the annual value of the licensed premises, subject to the minimum duty payable under scale 3, and subject also to the further provision now to be specified. (No question arises in this appeal with regard to the minimum duties.) By virtue of clause 3 of "Provisions applicable to Retailers' On-Licences" which are contained in the First Schedule, where it is shewn to the satisfaction of the Commissioners that the annual value of the premises exceeds 500*l*., a retailer's on-licence may be granted at the option of the licence holder on payment of an amount equal to one-third of the annual licence value so certified for the purposes of the said Act, provided that the duty payable in pursuance of this provision shall not be less than 250*l*. in the case of fully licensed premises. Clause 3 of the said Provisions also contains provisions for its application to cases where the annual licence value has not been certified before the duty becomes payable.

14. By virtue of s. 44, sub-s. 2, of the Finance (1909-10) Act 1910, in estimating for the purposes of that sub-section the value

as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration.

15. The petitioners will contend that by virtue of the statutory provisions applicable thereto (including those to which reference has hereinbefore been made) the annual value of the said premises as licensed premises fixed and certified under s. 14, sub-s. 2, of the Finance (1909-10) Act, 1910, ought not to be greater than the value of the said premises as adopted for the purposes of inhabited house duty less such portion of such last-mentioned value as is due to the consideration of profits not derived from the sale of intoxicating liquor.

16. The petitioners will further contend that apart from the considerations of law mentioned in the last preceding paragraph hereof the amount of 1503*l.* appearing in the certificate of July 21, 1911, as the annual value of the premises as licensed premises is excessive, and has not been estimated according to the principles of valuation properly applicable thereto.

17. The petitioners will also contend that the amount of 300*l.* appearing in the certificate of July 21, 1911, as the annual value which the premises would bear if not licensed has not been estimated according to the principles of valuation properly applicable thereto and is less than the rent which it would be reasonably possible to obtain for the said premises if not licensed.

18. The petitioners will also contend that the amount of 1203*l.* in the said certificate as the annual licence value of the premises is excessive.

19. The petitioners will contend and endeavour to prove that the following sums ought to be shewn in the said certificate, namely:—

As the annual value of the premises as licensed premises	900*l.*
As the annual value which the premises would bear if not licensed	350*l.*
As the annual licence value of the premises .	550*l.*

It was subsequently agreed that the annual value of the premises if they were not licensed was 300*l.*, and that the net annual profits

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derived from the sale of commodities other than intoxicating liquor was 97*l.* It was also admitted that the annual value of the premises was more than 500*l.* and that the licence-holder had exercised the option, conferred upon him by the third clause of the "Provisions applicable to Retailers' On-Licences" in the First Schedule to the Finance (1909-10) Act, 1910, to have a retailer's on-licence granted to him on payment of an amount equal to one-third of the annual licence value as certified for the purposes of the Act.

Witnesses were called to prove the annual value of the premises; the substance of their evidence is stated in the judgment.

Sir Alfred Cripps, K.C. (*Ryde, K.C.*, and *Konstam* with him), for the petitioners. Under clause 3 of the "Provisions applicable to Retailers' On-Licences" in the First Schedule to the Finance (1909-10) Act, 1910, the duty payable in this case is "an amount equal to one-third of the annual licence value as certified for the purposes of this Act." By s. 44, sub-s. 2, the annual licence value is the amount by which the annual value of the premises as licensed premises exceeds the annual value of the premises if unlicensed. It is therefore necessary to consider on what principle the annual value of the premises as licensed premises is to be ascertained. By s. 8, sub-s. 1, of the Revenue Act, 1911, "the annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value" is the inhabited house duty value. The present case is one in which it is necessary for the purpose of arriving at the amount of the duty to ascertain the annual value, and it is therefore a case in which the duty is charged "by reference to annual value" within s. 8, sub-s. 1, of the Revenue Act, 1911, and it follows that 997*l.*, which is the inhabited house duty value, must be taken to be the annual value of these premises if licensed. The annual value of the premises without a licence has been agreed to be 300*l.*, and the result is that the annual licence value, apart from a deduction to be dealt with subsequently, is 697*l.*

If, however, the inhabited house duty value is not to be taken as the annual value, the same result will in fact be arrived at if

the calculation is made under s. 44, sub-s. 2. Under that section the annual value of the premises when licensed and when unlicensed is to be "calculated on the same basis as that on which the amount to be paid as compensation under s. 2 of the Licensing Act, 1904, is calculated." Sect. 2 of the Licensing Act, 1904, has now been replaced by s. 20, sub-s. 2, of the Licensing Consolidation Act, 1910. Under that section the compensation is to be determined in the same manner "as on the valuation of an estate for the purpose of estate duty." That imports s. 7, sub-s. 5, of the Finance Act, 1894, under which the value of any property is to be assumed to be the price which the property would fetch if sold in the open market. Therefore the annual value of these premises when licensed must be calculated on the basis of the price in the open market. It is conceded that in ascertaining that market price the fact that brewers may be possible competitors for the premises must be taken into account, but in the case of a tied house the actual amount of profit made by the brewers out of the sale of their beer in the house cannot enter into the calculation: *Bradford-on-Avon Assessment Committee* v. *White*. (1) The question what profit brewers might make out of a tied house would be quite immaterial to an intending tenant. The judgment of Kennedy J. in *Ashby's Cobham Brewery Co.'s Case* (2) has no application to the present question, for there the calculation had to be made on the basis that the licence was coming to an end, whereas here the assumption is that the licence will continue.

The last question is as to the meaning and effect of the last paragraph of s. 44, sub-s. 2, which provides that no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration in estimating the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor. The public house in question comes within that provision, and on its true construction the amount of net profits derived from the sale of non-intoxicants must be deducted in order to arrive at the annual licence value.

Sir Rufus Isaacs, *A.-G.* (*Sir J. A. Simon*, *S.-G.*, and

(1) [1898] 2 Q. B. 630. (2) [1906] 2 K. B. 754.

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Lowenthal with him), for the respondents. The inhabited house duty value has no application to this case, for the duty payable is not "charged by reference to annual value" within the meaning of s. 8, sub-s. 1, of the Revenue Act, 1911, but by reference to annual licence value "as certified for the purposes" of the Finance (1909-11) Act, 1910. In order to ascertain the annual licence value one is therefore referred back to s. 44, sub-s. 2, which stands unaffected by s. 8, sub-s. 1, of the Act of 1911, although s. 44, sub-s. 1, is repealed by it. It is true that under s. 44, sub-s. 2, in order to arrive at the annual licence value, the annual value of the premises must be ascertained, but the annual value referred to in s. 44, sub-s. 2, is different from the annual value dealt with in s. 44, sub-s. 1 (for which s. 8, sub-s. 1, of the Act of 1911 is now substituted), in all essentials. It is different in the purpose for which, in the manner in which, and in the tribunal by which it has to be ascertained. Under s. 44, sub-s. 2, the annual value of the premises when licensed must be calculated according to the principles laid down by Kennedy J. in *Ashby's Cobham Brewery Co.'s Case* (1) with regard to ascertaining the value of premises for compensation purposes under the Licensing Act, 1904. The amount of profit which the brewers would make out of a tied house is an element to be taken into account, and the annual sum which the brewers would be willing to pay for the opportunity of earning that profit must be added to the rental value of the house in order to arrive at the annual value for the purpose of s. 44, sub-s. 2.

With regard to the claim to deduct the net profits derived from the sale of non-intoxicants, the last paragraph of s. 44, sub-s. 2, does not apply to an ordinary public-house like the one in question, the main business of which is the sale of intoxicating liquor, but only to hotels or to premises like hotels, which are mainly used for purposes other than the sale of intoxicants. The application of this part of the section must clearly be subject to some limitation, for there is probably not a public-house in the kingdom in which there is not some sale of non-intoxicants; but if it had been intended to apply to all licensed premises the section would not have been confined to

(1) [1906] 2 K. B. 754.

hotels or other premises used for purposes other than the sale of intoxicating liquor. But in any case there is nothing in the language of the section to justify the deduction of the whole of the net profits. It is the increased value arising from profits not derived from the sale of intoxicating liquor which is not to be taken into consideration. Profits on non-intoxicants sold on licensed premises are larger than in unlicensed premises, and it is only that extra profit which is intended to be deducted. If the petitioners' contention is right, the result would be that in the case of large hotels, where the profits not derived from the sale of intoxicants exceed the profits from intoxicants, there would be no annual licence value at all. Sect. 45 expressly deals with cases of hotels or restaurants where that state of things arises by providing for the payment of a reduced duty, but if the argument for the petitioners is sound s. 45 would not have been required.

Sir A. Cripps, K.C., in reply. It is possible that there may be cases in which there is no annual licence value, and the amount of duty payable in cases of that sort would be governed by s. 45, sub-s. 4. The object of the last paragraph of s. 44, sub-s. 2, was to encourage the sale of non-intoxicants, and there is nothing in the language used to warrant the construction that an ordinary public-house carrying on a substantial trade in non-intoxicants is not included, or that the total net profits from non-intoxicants are not to be deducted. With regard to the other point, s. 44, sub-s. 2, by making the "basis" of the calculation the same as that employed for the purpose of compensation, does not necessarily introduce all the same elements as have to be considered when dealing with capital value. Basis does not mean the same thing as method. The basis is to be the market price. In the case of annual value the goodwill test cannot be applied, and the question of brewers' profits is immaterial.

Sir J. A. Simon, S.-G., was about to reply, when

Sir A. Cripps, K.C., objected that the Crown had no general right of reply in revenue cases.

HAMILTON J. held on the authority of *Maryon v. Chaudin v. Commissioners of Inland Revenue* (1) that the Crown had a general right of reply in revenue cases.

(1) (1851) 6 Ex. 464, at p. 478.

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Sir J. A. Simon, S.-G. The primary object of s. 44, sub-s. 2, is to provide for the keeping of a register which shall shew the annual licence value of all fully licensed premises and beer-houses, and for that purpose the annual licence value is to be calculated in the same way as the capital value is calculated for the purpose of compensation. The intention was that both for taxation and for compensation the value should be the same, that is to say, that the annual licence value is to be the compensation capital value decapitalized.

HAMILTON J. By s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, it was provided that "the annual licence value" of licensed premises "shall be fixed and certified for the purposes of this Act by the Commissioners of Inland Revenue" . . . . "and any such certificate shall be subject to the like appeal as that to which the determination of the Commissioners of Inland Revenue of the amount to be paid for compensation under sub-section 2 of section 2 of the Licensing Act, 1904, is for the time being subject, ... and the costs on any such appeal shall be in the discretion of" the Court. The petitioners Truman, Hanbury, Buxton & Co., Limited, who are the owners of licensed premises known as the Eagle public-house, 217, Great College Street, in the county of London, and the petitioner Warden, who is the tenant of the house, being the parties aggrieved by a certificate issued by the Commissioners of Inland Revenue, dated July 21, 1911, have exercised their right to appeal in the case of the annual licence value of the public-house in question. As the case is a test case, it has been agreed that no exception shall be taken upon any matter of form or procedure, so as to obtain as far as possible a decision that will cover this and other cases. The facts with regard to the house have been in great measure agreed. It is a very good one of its kind, and has been selected because it appears to be free from any peculiarity whatever and is as suitable as any that could be selected for the purpose of raising a point of general application.

At all material times there has been in force in respect of the Eagle a publican's licence or retailer's on-licence for spirits within the meaning of Part II. of the Finance (1909-10) Act, 1910. The house is held upon a lease from the brewers, Truman,

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Hanbury, Buxton & Co., dated June 1, 1909, for a term of ten years. It is tied for the purchase of malt liquors from these brewers. It is held at an annual rent, in addition to which a premium was paid on the granting of the lease of 10,500*l.* which, when reduced by the deduction of a sum representing debts outstanding, is equivalent to 9000*l.* premium, and, taking that into account with the actual annual rent, the resultant annual consideration for the tenancy is in excess of 500*l.* per annum. Accordingly the licence-holder has exercised his right under clause 3 of the provisions applicable to retailers' on-licences in the First Schedule to the Act of 1910, which provides that where it is shewn to the satisfaction of the commissioners that the annual value of the premises exceeds 500*l.*, which is the case in question, a retailer's on-licence may be granted at the option of the licence-holder on payment of a sum equal to one-third the annual licence value as certified for the purpose of the Act. It becomes, therefore, necessary, for the purpose of calculating the payment to be made by the licence-holder, to ascertain the annual licence value as certified for the purpose of the Act, and hence this question in the first instance arises. Two points are made by the petitioners, both of importance: first, that the inhabited house duty value of the premises is the annual value for the purpose in question, or, alternatively, that such value calculated under the provisions of the Act, s. 44, sub-s. 2, would give the same figure, 997*l.*, as the amount in the rate book at which the inhabited house duty of the Eagle now appears; secondly, that there should also be an exclusion under the last paragraph of the same sub-section of all profits not derived from the sale of intoxicating liquor, with the result of a further diminution of the annual licence value by the amount of 97*l.* Thus the amount to be paid for the licence would be reduced below the minimum in the schedule, and only 250*l.*, the minimum duty, would be payable for the licence.

The charging section with regard to duties on liquor licences under the Finance Act is s. 43, which fixes the amounts and application of the licences by reference to the First Schedule of the Act. The schedule is applicable to many matters and many kinds of licences; and the table of retailers' licences involves

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reference to the annual value of the licensed premises. Accordingly s. 44, sub-s. 1, of the Finance Act states how the annual value of premises is to be determined for the purpose of any duty charged in the First Schedule to the Act; namely, in the same manner and subject to the same conditions under which the annual value of the premises is determined for the purpose of a publican's licence, subject to this, that in the determination of the value the duty on the licence is not to allowed as a deduction. That reference to the mode of determining the annual value of premises refers, in the case of the metropolis, to the Metropolis Valuation Act, 1869, and in some other cases to the Excise Act, 1825, s. 5. In 1911 the Legislature amended this portion of the Finance (1909-10) Act, 1910, by repealing sub-s. 1 of s. 44 and enacting in its place s. 8 of the Revenue Act, 1911. In the result, therefore, as now read, s. 44 of the Finance (1909-10) Act, 1910, has as its first sub-section s. 8 of the Revenue Act, 1911. Its second sub-section is not expressly affected by the Act of 1911. It is in the terms of s. 8 of the Act of 1911, as substituted for sub-s. 1 of s. 44 of the Act of 1910, that the reference to the inhabited house duty value occurs. Sect. 8 provides that: "The annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value shall be in England and Scotland (*a*) the inhabited house duty value if there is such a value applicable; and (*b*) in a case where there is no inhabited house duty value applicable, the income tax value if there is such a value applicable; and (*c*) if there is neither an inhabited house duty value nor an income tax value applicable, the annual value as determined by the Commissioners of Customs and Excise in accordance with the Acts relating to excise, but having regard in all cases to any decrease in the annual value resulting from any increase under the provisions of the principal Act in the licence duty. For the purposes of this provision the inhabited house duty value means the value as adopted for the purposes of inhabited house duty, and the income tax value means the value as adopted for the purposes of income tax under Schedule A of the Income Tax Act, 1853." Then follows a rather more extended reference to the provisions that shall apply to Ireland, and then comes the sub-section which substitutes the

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above provision for the repealed sub-section. The object of this section is to afford a mode of determining the annual value of premises for the purposes of duties charged in the First Schedule. As a matter of construction I think it is clear that the words "charged by reference to annual value" qualify the antecedent word "duty," and do not qualify, and are not immediately attached to, the still further antecedent words "annual value." It is not that the annual value of any premises which are charged or calculated or estimated by reference to annual value shall be the inhabited house duty; but where the duty on an excise licence is charged by reference to annual value, then for the purpose of that duty the annual value of the premises shall be calculated in the way made applicable. The effect is manifest on reference to the First Schedule to the Act of 1910. That schedule deals with licences for manufacturers of intoxicants, licences to be taken out by wholesale dealers in intoxicants, licences to be taken out by retailers, and includes also other commodities with regard both to the manufacture and the sale, such as sweets, and charges some licences by reference to the quantity of the commodity manufactured and other licences by reference to the class of licence that had been previously taken out for the right to deal in the commodities. It is only when you come to the retailers' licences, of which the petitioners' licence is one, that you find a duty is being charged by reference to annual value. In the case of spirits that duty is half the annual value of the licensed premises, in the case of beer one-third of the annual value of the licensed premises, in each case subject to a minimum. Both as a matter of construction of the section and also as a matter of the structure of the Act, what is referred to in s. 8 of the Revenue Act, 1911, by the words "charged by reference to annual value," is that class of excise duty imposed by the Act which is defined in the schedule by reference to annual value. Those words show that the preceding provisions have nothing to do with excise licences charged in other ways. The purpose of sub-s. 1 of s. 44, as it now stands, is to lay down the mode of determining the sums to be paid where a licence has to be paid for by reference to annual value. It is contended that the words "by reference to annual value" are so wide that when

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in accordance with the terms of clause 3 of the provisions applicable to retailers' on-licences, the licence-holder has elected to take a licence on payment of an amount equal to one-third of the annual licence value as certified, then if, in arriving at the annual licence value as certified, annual value has to be taken into account as one of the factors in the calculation of the annual value of the licence, the inhabited house duty value of the premises is imported, simpliciter, as the figure which represents that factor. I think there is no ground for giving such an extended effect to s. 8 of the Revenue Act, 1911. The purposes and the terms of the first two sub-sections of s. 44, whether sub-s. 1 be taken in its former or present form, are quite separate and distinct. Sub-s. 1 was for the purpose of determining annual value of premises where duty was charged by reference to annual value of the premises. Sub-s. 2 is, and always was, primarily to provide for the creation and maintenance of a register shewing the annual licence value of all fully licensed premises and beer-houses, a purpose in itself quite different from the purposes of sub-s. 1, and which, even under the existing statutory provision, is in the main independent of the purpose of sub-s. 1. It is noticeable that under sub-s. 1 of s. 44, as it now stands, the Commissioners of Customs and Excise are the authority for determining values, and not the Commissioners of Inland Revenue; whereas under sub-s. 2 of s. 44, though the Commissioners of Customs and Excise—being the authority to whom the word "Commissioners" refers—have the duty of preparing and keeping the register, the fixing of the annual licence value, which is to appear in the register, is entrusted to the Commissioners of Inland Revenue, and any appeal is an appeal against the determination of the Commissioners of Inland Revenue. Hence, if sub-s. 2 of s. 44 has been enacted for the purpose of eking out sub-s. 1 of s. 44, it does so by creating a situation in which conflicting decisions may be arrived at by boards of commissioners of co-ordinate jurisdiction who may arrive at different views on a question of fact. The purpose of s. 44, sub-s. 2, is to create a register shewing the annual licence value of all fully licensed premises and all beer-houses. That is a

different matter from the matter dealt with in sub-s. 1, which is supplemental to the charging section and the schedule. For these reasons I do not think the inhabited house duty value, as such, can be taken in ascertaining for the purpose of this licence the annual value of the premises in question.

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If so the petitioners resort to the second paragraph of s. 44, sub-s. 2, for the purpose of ascertaining how the annual licence value is to be calculated, and say the same result will necessarily be arrived at as if the inhabited house duty value had been taken, because the principles of calculation and the factors of calculation will be the same, and therefore 997*l.* must still be taken as the annual value of the premises for the purpose in question. The result is strange. The mode in which the annual licence value is to be ascertained is prescribed in the first words of this paragraph: "the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value, which the premises would bear if they were not licensed premises." Annual licence value is the excess, if any, of the annual value of the premises as licensed over the value the premises would bear if they were not licensed. Arithmetically that might result in a minus quantity: and, if a recent decision in the Court of Session (1) upon an analogous subject-matter, site value, applies, the annual licence value under such circumstances would be nil. In any case annual licence value is the result of a computation, and depends upon the correct estimation of two factors, one of which exists in fact, because the premises, at any rate in cases like the present, are old licensed premises; and the other, that is, the annual value if unlicensed, does not exist in fact, but has to be ascertained upon some hypothesis. Now under s. 43 and under s. 44, sub-s. 1, as it stands, for the purpose of the calculation of the duty for the sale of spirits, the licence-holder would have to pay one-half of the annual value of the licensed premises. In a very large number of cases that might result in a very large sum having to be paid, because the annual value of the licensed premises, owing to their position and the value of the land for other purposes, might be very high. Accordingly

(1) *Herbert's Trustees* v. *Inland Revenue* (1912) 49 Sc. L. R. 699.

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clause 3 of the Provisions applicable to retailers' on-licences gives the licence-holders, where the annual value is shewn to exceed 500*l.*, an option, in lieu of paying half the annual value, to pay one-third of the annual licence value. If the annual licence value properly taken is the same as the annual value under s. 8 of the Revenue Act, 1911, in every case of premises of high value there would be a loss to the revenue, and a relief to the taxpayer on a very large scale. The word "option" would be inappropriate, because there would be no choice in the matter; it would be a certainty. The result for the revenue would be that whereas premises of an annual value of less than 500*l.* would pay for a publican's spirit licence one half of their annual value, the licence-holder of premises exceeding 500*l.* in annual value would be entitled as of right to pay one third only. This discrimination in favour of the well-to-do, as against the humbler licence-holders, is one of which I see no other trace throughout this statute. I think that if the petitioners' is the true construction the section must have been so worded somewhat by inadvertence.

The sub-section itself differs from s. 44, sub-s. 1, both in its older and in its present form, because it contains no reference to any of the modes of ascertaining annual value for the purpose of rating or annual imposts. It refers to a statutory mode of ascertaining compensation under the Licensing Act, 1904. On the other hand, s. 44, sub-s. 1, contains no reference to the Licensing Act, 1904, or any similar provision, but only a reference to modes of calculation, which have been described as rating modes. The Legislature, in directing how the annual value of premises, licensed and unlicensed, shall be calculated, has done so by express reference to a statutory provision not based on rating principles, and has omitted any reference to the rating modes of calculation which are alluded to in s. 44, sub-s. 1, as it now stands. Further, it has added one particular limitation, and one only, upon the application of the basis of the Licensing Act, 1904, namely, that there shall not be included in the value of premises as licensed the value of any amount on account of the depreciation of trade fixtures. If I understand the argument for the petitioners it is this: The annual value must mean that sum

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which, under free conditions, a willing tenant of a house would pay in order that he may have the advantages of a year's tenancy of the premises and the benefit of the licence during that time. The problem is to ascertain primarily the value of these premises, and you are not concerned with the value of any other premises. You must, of course, take due account of the facts which are ascertained or agreed with reference to the house immediately prior to the date of the inquiry, but if those facts include, as they often do, a restrictive covenant, a brewer's tie, you must evaluate that tie by some process of calculation so as to obtain the figure applicable to a free condition. But having done that, you are only concerned with ascertaining the value for a year of the premises licensed as they are. The enactment alludes to s. 2 of the Licensing Act, 1904 (now s. 20 of the Licensing Consolidation Act, 1910), and thus imports a reference to the Finance Act, 1894, s. 7, sub-s. 5, which provides that "The principal value of any property shall be assumed to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." Thus, it is said, by express enactment the open market basis is prescribed as the mode of calculation. The same result moreover would follow by attaching due weight to the words "annual value of the premises," because the annual value of the premises is an expression well known, and has been the subject of judicial decision, in particular the decision in *Assessment Committee of Bradford-on-Avon Union* v. *White*. (1) The test by which the facts which are material to the annual value of premises may be determined may be conveniently, although not exclusively, defined by adopting the language of my brother Channell in that case where he said: "I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special price which they may give, owing to personal considerations not founded upon the value of the premises, should be excluded except so far as the possibility of such special price being obtained raises the market generally." It is argued that whether, in the words of the Finance Act, 1894, you concern yourself with the

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price which the public-house would fetch in the open market, or whether, in accordance with the current use of the words "annual value" in rating cases, you endeavour to ascertain the value of premises, you will take into account the fact that brewers desire sometimes to obtain fresh public-houses and by their possible competition make it necessary for persons who are not brewers, or animated by the motives of brewers, to bid higher than they otherwise would do; but you must disregard the particular competition of brewers as such, and the circumstances that the more beer the brewer can brew the better he does, and the more licensed houses he can bind to take and sell his beer the more beer he will be able to make and sell. These are considerations foreign to the licensed premises and only germane to the brewery where the beer is manufactured. It is on these lines that Mr. Fuller, the principal witness for the petitioners, made his calculation. His calculation results in 998*l.* as the true figure, which is practically identical with the figure which has been given for the inhabited house duty, and it is this identity which led him to say, I think very properly, that he must have done substantially the same thing as in assessing the inhabited house duty. If this construction and his application of it be right, there is really no difference between charging premises over 500*l.* on the annual licence value and charging them on the annual value, except the fraction which is to be taken for the purpose of calculating the licence duty. Such is the argument, but I think that this construction is open to the objection that it gives no plausible effect to the words in s. 44, sub-s. 2, commencing "Those values being calculated." The same effect would have been obtained if the sub-section had ended at the word "premises" in line 4 of the second paragraph and had then resumed at the word "but" in the last line but two. It was suggested that, owing to the drafting difficulties under which legislation of this kind is passed, a circuitous expression is sometimes used in place of a concise one, and that a considerable amount of surplusage may find its way into a section without affecting the real construction. These are considerations of which I am no judge, for I know nothing of the conditions under which this or any other sub-section of the Finance Act of 1910

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was passed. I must follow the regular rule and secure that to every word of this paragraph its full meaning shall be given, unless I am driven either by the context or the character of the rest of the legislation, or, if such a thing be possible, by something unreasonable in the legislation itself, to set part of it aside as surplusage. I therefore ask myself what the Legislature can have referred to when it said "Those values being calculated on the same basis as that on which the amount to be paid as compensation under section 2 of the Licensing Act, 1904, is calculated in default of agreement in cases of compensation payable under that Act, but there shall not be included any amount on account of depreciation of trade fixtures." The history of the matter is this. In 1904 the principle was introduced by which, under certain conditions, it justices refused to renew an existing licence, otherwise than for misconduct, compensation was given by way of a capital sum for the cessation of the value formerly enjoyed. That principle was continued under the Consolidation Act of 1910, which re-enacts the Act of 1904. A decision well known, unquestioned, and ever since followed to the best of his ability by every gentleman who has to deal practically with those matters, was delivered in 1906 in the case of *Ashton's Cobham Brewery Co.* (1), and therefore, when the Finance Act spoke in 1910 of the basis on which compensation under s. 2 of the Licensing Act, 1904, is calculated, it meant s. 2 of the Licensing Act, 1904, as authoritatively construed in that case. I cannot imagine why the Legislature should there have alluded to a well-known uncontested mode of calculating something different from annual value, if it merely meant to enact that annual value as ordinarily understood in rating and other similar matters was to be the test and the only test. Furthermore, the words used are "on the same basis." It is said that the word "basis" is not the same as the word "method," and has nothing to do with calculation according to one rather a formula or another, but is an allusion to what is called the principle of the open market, the basis alike of compensation, because of the allusion to the Finance Act, 1894, and of calculation of annual value for rating purposes. I find that Kennedy J.

(1) [1906] 2 K. B. 754.

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in *Ashby's Cobham Brewery Co.'s Case* (1) used both "method" and "basis," and, I think, indiscriminately, but he quite clearly stated the problem before him in the following language: "To the estimate of the annual profit which, according to the ordinary course of brewers' trade may be treated as likely to be derived from the supply of liquor to licensed premises, there is to be added in order to get a basis for the calculation" (words which are not those in s. 44, sub-s. 2) "the rent which may be obtained from the tenant, the annual sum, that is to say, which he will be willing to pay in anticipation of the profits which he will receive from the retail sale of the liquor supplied to him by the brewers. The annual profit and the annual rent having been obtained, there still remains, in order to obtain the market value of the specific premises, the question of proper capitalization. The number of years' purchase which should be adopted will vary with the character of the premises, the circumstances of the locality, the prospect of improvement of the business done in a particular premises, the general state of the liquor trade, and competition in the market for the acquisition of this class of property, and in each case must depend on the evidence of competent witnesses." Then he proceeds on the materials before him to obtain the compensation value of each of the houses in question according to this principle. I can hardly doubt that the words in this section, "calculated on the same basis as that on which the amount to be paid as compensation, &c., is calculated," was a deliberate allusion to and approbation of the principles which have been compendiously described in that passage from the judgment of Kennedy J. The Legislature enacted that for the purpose of annual licence value, whatever might be the case for any other purpose, the annual value of the premises was to be calculated by considering, with reference to one year, what, in the case of compensation, would have to be considered with reference to perpetuity, namely, what willing bidders would give for the annual profit to be derived in the ordinary course of a brewer's trade from supplying liquors to the licensed premises, and by applying to that the appropriate multiplier for the purpose of capitalization. If that is prescribed

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by the statute, then the contention of the petitioners on this part of the case fails, because it rests on the assumption that inasmuch as market value is referred to in the enactment, and is the underlying notion contained in the words "annual value of the premises," therefore, in calculating the market value, you must exclude the estimate of the annual profit, which, according to the ordinary course of the brewer's trade, might be treated as likely to be derived from the supply of liquors to the licensed premises. It seems to me that some fallacy is involved in describing this construction as the market value test. The expression market value test involves asking what market, and to whom this market is open. I can quite understand that when, by reason of the nature of your subject-matter, you are contemplating a market to which only persons will be admitted who want to occupy the house and sell beer therein to customers, whether they are also brewers elsewhere or not, you are then much more limited in your purview than when the market is open not only to those who want to occupy the house and make a profit by selling the beer retail which they have bought wholesale, but also to those who want to obtain a tenancy because they can, under existing conditions, tie the house, and, by tying it, obtain an outlet for more of their own beer to the exclusion of other people's beer. The latter hypothesis appears to be simple and in conformity with the facts of the case. The former is artificial, because you postulate a brewer wishful to get the house merely as occupier, so as to affect the price which would be bid by people who are not brewers, because they have to contemplate him as a person willing to take the house for the purpose of selling other beer than that which he brews himself. It is a fictitious assumption, and requires a considerable amount of care to eliminate the facts from the problem: whereas if you postulate a brewer trying to get the house in order that he may from his own brewery sell his own beer and not other people's, you are dealing with a calculation which is at any rate somewhat nearer to the actual facts of the situation. The expression "basis" suggests, to my mind, the intention to apply to the ascertainment of something annual [which is to be for the period of twelve months and revised every succeeding

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twelve months) a calculation which has hitherto been made in law only with reference to a capital sum on the occasion of compensation. It is quite true that if you asked what sum a brewer would give in order for one year only to get the chance of selling his beer to a tied house, the answer would not be the whole of the profit on the barrelage, because in that case there would be no motive for having the house at all, but when you calculate the sum to be paid for this presumed advantage in perpetuity, if the law will permit it, then you do take that profit, adopting a multiplier which takes account of the fact that the profits will be paid for in full for a certain number of years, and after that will be enjoyed in full for the remaining years that there may be. That the calculation in *Ashby's Cobham Brewery Co.'s Case* (1) was a calculation which began by ascertaining the annual amount the brewer would obtain, and then proceeding to capitalize it, is quite clear; and what is meant by saying "calculated on the same basis" is only that it is to be the same calculation, except with such variations as the nature of the problem itself involves, namely, the expression of a sum which is not a capital sum but an annual sum, and which is therefore to be calculated, not by multiplying any annual figure by an assumed multiplier, but in some other way. I do not think it is necessary for me to lay down an exclusive mode in which this can be done; perhaps the most obvious way would be to do the capitalizing calculation as for the purpose of compensation and then decapitalizing it. Sir Alfred Cripps says the idea is illusory, for the introduction of the brewer's profits is in itself immaterial to the matter in hand, which is to ascertain what is the annual value of the premises as licensed premises, and therefore no decapitalization of an immaterial sum can be possible. I think that statement hardly correct; it is possible to decapitalize an immaterial sum, but it remains immaterial. The question is whether it is immaterial or not. It appears to me that Parliament has enacted that it shall be material. I cannot see why it should not be material; and I have the opinions of two out of three highly qualified gentlemen who have given evidence before me to that effect. Mr. Marks, who is second

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to no valuer in the profession, says that he sees no difficulty, and that, in fact, there is no difficulty in assuming and measuring the sum which a brewer would be willing to give for the right for one year—likely to be continued, but not necessarily—to sell his beer in a particular house, with reference to the profit he would make on the manufacture of the beer. As I understood the evidence of Mr. Trustram Eve he said the same thing: he did not think it right to take it into account, but he did consider that the brewer would give more for the house than any one else. Mr. Fuller, also a gentleman of high authority, took the contrary view: but he explained his meaning in a manner which leads me to think that it is founded more upon his view of the true construction of the Act than upon the bare facts of the case, because he said that if you decapitalize from the capital calculation under the compensation Act, you will get, not an annual value, but an annual sum or equivalent, and he urged that under ordinary circumstances "the annual value" of premises means the annual value of those premises, and not some other premises. With his mind, therefore, directed, as he thought the Act bound him to direct it, to rating, he no doubt said to himself, and rightly said to himself if it had been an annual rate, "I cannot take into account, in arriving at the annual value of the Eagle, something that really belongs to the annual value of Truman, Hanbury & Buxton's brewery. Their profits must be taken into account in the rating of the brewery. What we have to consider with reference to the annual value of the Eagle is the profit which can be made by the tenant of the Eagle, and that we ascertain, not by considering how much profit the brewery gets on sending beer to the Eagle, but how much the tenant gets from vending it by retail to customers." The answer to that is, I think, we are not dealing with that kind of matter. This is not an enactment for local rating of premises which take their place along with other premises that also have to be rated locally: this is a Revenue Act levying imposts upon a particular licensee which may, if the Legislature so wills, be measured by reference to premises other than the public-house in question. There is nothing contrary to principle in measuring the licensee-holder's duty on the Eagle by some introduction of the sum which

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might be made in the brewery by a person who has the landlord's interest in the Eagle, and consequently there is no necessity in the nature of things for the annual value in this sub-section to be the same annual value as it would be for the purpose of rating; and when I find the actual words of the Legislature importing into it a different calculation and a different basis, there seems to me to be a plain necessity to give the words that effect. If it be necessary to look for a reason why the Legislature should have done so, although that seems to me to be a matter of policy and not of construction, I think it might be very well found in the fact that as the Legislature has enacted that upon the extinction of a licence by non-renewal there shall be compensation, I care not from what fund, measured in part by the brewers' profit arising out of the continuance of the licence, so, when the licence is created, and licence duty has to be paid, the payment shall be assessed by reference to the same class of facts (reducing it only to the annual measure), on the same basis, so as to correspond with the capital or compensation measure.

These seem to me to be reasons why, without saying that there is any one mode of calculation in which it shall be applied, the principle of *Ashby's Cobham Brewery Co.'s Case* (1) was intended to be imported into the construction of sub-s. 2 of s. 44. It is to be noticed, as was pointed out by the Solicitor-General in reply, that in that case the Crown's argument, which failed, was that what was being given was compensation for a public-house, and that, therefore, all you had to do was to ascertain the value of the public-house, which could not be done by importing what the brewer might make by brewing beer at the brewery which he was afterwards to deliver to the public-house. The reason why that view was disregarded was not any difference between the annual and capital problem, but the plain fact that, in considering the capital value of the compensation to be paid in the case of a house owned by a brewer, it is necessary to take into account the fact that the brewers bought the house in order to sell their own beer, and thus got the opportunity of brewing more beer and making more brewery profits. Instead of

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capitalizing and decapitalizing, a simple plan, and I should have thought an equally effective and feasible plan, would be to ascertain the annual value by following the words of the Act and saying, amongst other things, what sum would a brewer, denuded, of course, of every special characteristic or peculiarity, skill, popularity, personality, and so forth, an ideal or abstract brewer, give, according to the ordinary course of the brewery trade, to obtain the annual profit likely to be derived from the supply of the whole of the malt liquors to the licensed premises in question. I agree the calculation is rather an abstract one, but I do not see why it should not be performed by a direct assessment of that annual figure. I think, therefore, that the construction of s. 44, sub-s. 2, which I must adopt, is the construction adopted by the Commissioners of Inland Revenue.

There arises a further question. Under the last paragraph of s. 44, sub-s. 2, in estimating the value as licensed premises of hotels, or other premises used for purposes other than the sale of intoxicating liquor, for the purpose of the creation of the register shewing the annual licence value of all fully licensed premises, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration. The facts here are material. In the ordinary sense of the word this house is not an hotel. In addition to being a public-house it is an eating-house and serves luncheons daily. I find from agreed figures that it does something like 1050*l.* or 1100*l.* of trade in tobacco, mineral waters, pies and cakes and provisions, upon which the rate of profit varies very much. Upon the whole a profit of about one-third is made, but the range of profit is from 9 per cent. on pies to 60 per cent. on mineral waters. It is plain, therefore, that this is a substantial and beneficial branch of the trade of the house. The petitioners say that this building, if not an hotel, comes within the words "other premises" used for purposes other than the sale of intoxicating liquor, and that being so, under the last words of the paragraph, by some calculation or other there must be a complete elimination from the figures got out in order to fix the annual licence value of the increased value arising from profits not derived from the sale of intoxicating liquor, which means a further deduction of 9*l.*

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I will first deal with the question whether the premises come within the words "hotels or other premises." They certainly are premises used for purposes other than the sale of intoxicating liquor; they are used for this luncheon and eating-house business. The Attorney-General contends that the words "hotels or other premises" must be construed by the rule of construction called ejusdem generis, that "other" means other premises of the nature of an hotel. It is true that "hotel" is not defined, but some indication of what the Legislature means by that word I think can be derived from s. 45, sub-s. 1, where it refers to premises used for the reception of guests and travellers desirous to sleep on the premises. The principal contest is as to the word "hotel," and there is no evidence that travellers or guests ever desire to sleep, or do sleep, in the Eagle. I do not think that this construction is right. As I understand the ejusdem generis rule, it is a principle applicable where there is an enumeration of two or more particulars completed by general words, which thus indicate a genus of which the enumerated particulars are species, and into which genus every other species capable of coming within it is gathered by the concluding words. That is a different grammatical position from the present one, where the word "or" is introduced adversatively, and the subject-matters are really contrasted, the hotels on one side, "or" other premises used for purposes other than the sale of intoxicating liquor, not being hotels, on the other side. It may be that this is a case in which the word "hotel" has not been used scientifically, but merely as a type or as a clue to the general purport of the section, but I do not think I can insert (which is what the argument for the respondents requires) the word "similar" between "other" and "premises." I think that the words "other premises used for purposes other than the sale of intoxicating liquor" are a separate description in themselves, and the real question is what "used" means. It means used in a real and substantial sense, in a business sense, and it excludes trivial, casual, and incidental user. I therefore do not accept the view that it means used mainly for purposes other than the sale of intoxicating liquor, which was the Attorney-General's contention, the test suggested being

whether a greater amount of profit was made by one class of business or the other. I ask myself, are these premises really and substantially used for purposes other than the sale of intoxicating liquor? I have no doubt that they are.

What is to be excluded from consideration in the case in question? The first thing to be looked at is the phrase "In estimating for that purpose." "That purpose" is the purpose stated in paragraph 1 of s. 44, sub-s. 2, the preparation and maintenance of the register of all fully licensed premises. The register has no particular reference to premises over 500*l.* in value any more than to premises under 500*l.* in value. It has no particular reference to premises which combine the sale of non-intoxicating liquor with the sale of intoxicating liquor any more than to premises which confine themselves to a trade in strong drink. Except incidentally, this register is not concerned with the present taxation of the licence-holder's licence. The only allusions to it in the rest of the Act are in s. 45 and in clause 3 of the provisions applicable to retailers' on-licences in the First Schedule, but it seems manifest, and indeed I think it is common ground, that those two references by no means exhaust the possibilities of this register in future.

It apparently was thought well by the Legislature to ascertain and record from year to year in the case of all fully licensed premises and all beer-houses their annual licence value. That annual licence value is something which might not inaptly be described as the monopoly value, that is to say, the excess of value as licensed premises over the value if unlicensed (if there be any such excess), which may, therefore, represent for fiscal or economic purposes the money value of the privilege which the licence affords. That I take to be the purpose with which the register is established. Its incidental purposes are contained in s. 45 and the schedule. About its future purposes it is immaterial for me to speculate. It is possible (the Solicitor-General affirms, and Mr. Hyde denies) that some guidance may be obtained by justices who have to decide whether the licence of public-house A or B shall be selected for suppression, if they know the annual licence value stated against those two public houses in the register. It is enough for any purpose that the subsection is to

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create a register, which as far as possible shall be a scientific determination of the annual value conferred by the licence on the premises in question. I think that affords the clue to what is meant by "increased value arising from profits not derived from the sale of intoxicating liquor." The same idea is to be found in the proviso to s. 14, sub-s. 1 (*a*), of the Licensing Act, 1910, which is repeated from the Licensing Act, 1904, where, again, the justices are to impose such conditions as they "think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed: provided that in estimating the value as licensed premises of hotels or other premises where the profits are not wholly derived from the sale of intoxicating liquor, no increased value arising from profits not so derived shall be taken into consideration." The petitioners contend that the words should be applied in this way: Having ascertained the licence value in the ordinary way we take the fact that this house sells commodities which are not intoxicating; we have, therefore, to proceed from the general calculation to a special calculation which that fact requires. That calculation involves the exclusion of profits not derived from the sale of intoxicating liquor, and accordingly we take it off. There are three ways in which that may be done, but all three result in the same figure, 97*l*. I think this involves first of all a disregard of some of the words of the section, and in the second place it involves the view that the paragraph is intended for the protection of the publican who keeps the hotel or similar premises, although such protection is separately provided by sub-s. 1 of s. 45. It may be that the petitioners' construction does not strike out the words "value arising from," because in dealing with the value as a subject-matter of the calculation, and with something which is not to be taken into consideration in calculating that value, it may be proper to say that that which is excluded is the value arising from the profits, and not merely the profits themselves. It is assumed that there are profits. We are not dealing with things supplied gratuitously or at cost price for the purpose of stimulating the trade in intoxicating liquor; we are dealing

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with separate articles the subject-matter of payment, like the use of rooms or other amenities in addition to actual sale from which profits will arise. But I think the construction of the petitioners gives no value to the word "increase," and I have been unable to find in their view of the matter what was added by the Legislature when it inserted "increased" before "value." Increased value certainly implies a comparison with a value not increased, the ordinary value that might be obtained by selling non-intoxicating commodities on unlicensed premises. This has been already taken into account on both sides, first in ascertaining the actual licensed value, and, secondly, as an element in the hypothetical value, if the premises were unlicensed. It has been eliminated in that way, and the Legislature seems to me to be dealing with some supposed increase from that basis; whereas, on the other construction, you are deleting altogether profits not derived from the sale of intoxicating liquor and making them the subject-matter of a complete abstraction not merely excluding increased value. That seems to me to be contrary to the true construction and also to the purpose of the sub-section, because s. 45 in its various sub-sections deals very fully with the case of hotels and licensed premises structurally adapted to be used, and in fact used, for the purpose of the reception of guests and travellers desirous of sleeping on the premises, and the case of licensed premises structurally adapted for use, and in fact used, as a restaurant, which is to some extent the case of the Eagle, and provides there for abatement of a substantial kind subject to a minimum. This minimum is a counter-protection to the revenue against those abatements reducing the licence duty to a vanishing point, and against the possibility that the deduction of annual value as unlicensed premises from the annual value of licensed premises might leave a minus quantity. I see no reason why s. 44 should extend the protection given to those who make profits on licensed premises without deriving them from the sale of intoxicating liquor, beyond the protection already given separately in s. 45. It was, however, argued that "increase" was an inappropriate word and must be disregarded because no other reasonably possible interpretation could be put on the section. I think that makes it necessary for me to decide whether

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the Attorney-General's construction of this section is right or wrong; otherwise I should have decided the issue by saying that the claim for an abatement of 97*l.* was not made out. If that abatement may be supported by saying that no other construction is possible, then I have to inquire whether any other construction of the paragraph is possible or not. The Attorney-General said that it bore, and rightly bore, a construction which would have the effect of giving the licence-holder some further abatement, even after the right annual licence value had been ascertained, the exact amount of which he did not think it necessary to discuss because he had no doubt he would be able to agree with Sir Alfred Cripps the sum to be allowed in this case. I need therefore say nothing as to what the amount to be allowed would be on his construction, or how it would be calculated, except in case of their failing to come to an agreement, which is most improbable, when the matter would have to come back to me. The construction is this: there are some cases, perhaps many cases, in which if you sell non-intoxicating liquors on licensed premises, or render services not consisting in the provision of intoxicating liquors on licensed premises, you are able to charge, and do charge, more than you would be able to charge or would charge in premises not licensed, although of equal social pretension and physical comfort, and although the prime cost of the commodity or the service is the same, apart from any question of the licence duty itself as one of the overhead charges. The profit therefore arising from this circumstance is much enhanced; and I have had evidence, which I accept, to that effect. It appears, and experience does not suggest any reason for questioning the evidence, that the extra profit which a licence-holder as such can make out of non-intoxicating beverages, for example, is substantial. It is well known that the same bottle of soda water will cost you more if you order it in a public-house than it would cost in an unlicensed restaurant next door, equally comfortable, but where you could not mix it with whisky without sending out for the whisky. Similarly it is said, and there is no reason to question it, that as between two hotels of equal convenience and equal social attraction and equally admirably situated, one licensed and the other unlicensed, a room will

cost more in the licensed than in the unlicensed premises. Then it seems to me that it may arise in a third way. There are circumstances in which more of a non-intoxicating article will be sold, though at the same price that it would cost outside, by reason of its being sold in licensed premises. If a party consisting of persons who do and persons who do not want to take intoxicants seek refreshments in company with one another they must go to licensed premises, because only thus can the persons who want intoxicants get them conveniently; and the non-intoxicant business in that case goes to the licensed house and not to the unlicensed: I daresay there are scores of other ways in which the thing arises. It seems to me to be the fact that there is an element, possibly inestimable by any but the rudest mode of valuation, in the business of a licensed house deriving profits otherwise than from the sale of intoxicating liquors, which represents an increased value of the premises arising from the circumstance that the two trades are carried on on the same premises. The words "increased value" in that paragraph of s. 11, sub-s. 2, clearly mean the increased value of the premises as licensed premises. I think the Legislature excluded this increased value with two objects: the principal object was in order to ensure that the annual licence value registered shall be as scientific as it possibly can be; the second, and quite a subordinate one, is that it puts out of question disputes that might otherwise be raised in ascertaining how much a given licence-holder shall pay. If, having endeavoured to abstract the annual unlicensed value by deducting it from the annual licensed value, you fail to take into account this fact, that there is an element of profit attaching to the term intoxicants sold in a licensed house which does not attach to them in an unlicensed house, you find straying, so to speak, into the annual licensed value an element that properly belongs to the annual unlicensed value, not successfully eliminated from it by the mere process of subtraction, and you must eliminate it by some other additional refining process of calculation. It is an additional advantage that when an intending licence-holder comes to have the annual licence value calculated, this particular increased value, at any rate, is to be excluded and he is not to be

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prejudiced in respect of it. I do not say that the Legislature may not have had other wise purposes in view in this enactment: doubtless it had. Sir Alfred Cripps suggested that the Legislature desired that people should be able to get things to eat in a licensed house, and not merely intoxicating drink. How that may be I do not know, but it does not appear to me that the intention of the excluding paragraph was simply to cause a deduction of profits made in the house but not derived from the sale of intoxicating liquors.

The result, therefore, of my decision on this second matter, minor in amount, but not the less important in general application, is adverse to the petitioners. I adopt the alternative construction contended for by the Attorney-General, and that is fatal to the petitioners' contention. I have come to the conclusion with regard to the annual licence value for the purposes of the licence-holder's duty, charged by reference to annual value, that the figure contended for by the Attorney-General is right, 1545*l.* as against 997*l.*, and as for the purpose of this case, although not beyond it, the petitioners have agreed that the unlicensed value is 300*l.*, the same deduction will be made in either view.

In the result the petition fails on both matters, and as by the Act the costs are in my discretion, the petition is refused with costs.

Appeal dismissed.

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Against this decision the petitioners appealed. The Commissioners on the other hand appealed at the Bar against that portion of the judgment of Hamilton J. in which he held that the proviso to sub-s. 2 of s. 44 of the Finance (1909-10) Act, 1910, applied to all licensed premises substantially used for purposes other than the sale of intoxicating liquor, and was not confined to hotels and premises ejusdem generis.

June 6. *Sir Alfred Cripps, K.C., Ryde, K.C.,* and *Konstam,* for the appellants (the petitioners). The first point arising upon this appeal is on what principle the annual value of the appellants' premises as licensed premises is to be ascertained for the

purpose of arriving at their annual licence value. That depends upon the question whether or not the effect of s. 8, sub-s. 1, of the Revenue Act, 1911, was to make the inhabited house duty value the measure of the annual value under s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910. It is submitted that it did have that effect. Sect. 8, sub-s. 1, of the Act of 1911 provides that "the annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value" is the inhabited house duty. In this case it is necessary for the purpose of arriving at the amount of the duty to ascertain the annual value, and it is therefore a case in which the duty is charged "by reference to annual value" within s. 8, sub-s. 1. **It was held by Hamilton J. that s. 8, sub-s. 1, of the Act of 1911 applies only to sub-s. 1 of s. 44 of the Act of 1910, but it is** submitted that it applies equally to sub-s. 2 of that section.

The other question arising on the appeal is as to the meaning and effect of the latter part of s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, which provides that no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration in estimating the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor. Hamilton J. decided in favour of the petitioners that that proviso was not applicable only to hotels or other similar premises, but that it applied to a public-house like the Eagle. He held further, however, that it was not the value arising from the whole profits on the sale of non-intoxicants which was to be excluded from consideration, but only so much thereof as arose from profits which could not have been made upon the premises if they had been unlicensed. That view of the effect of the proviso cannot be supported. The object of the Legislature was to place a tax upon intoxicants and to encourage the sale of non-intoxicants in public-houses. That is a comprehensible view; and accordingly the section provides that for the purposes of duty profits arising from the sale of non-intoxicants are to be excluded. Hamilton J. wrongly applied the word "increased" to "profits," whereas it should be applied to "value," i.e., of the premises. His construction is unnatural and impossible.

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Sir J. A. Simon, S.-G., and *Lowenthal* (*Sir Rufus Isaacs, A.-G.*, with them), for the respondents. Previously to the passing of the Finance (1909–10) Act, 1910, the duty on licences was not in proportion to the annual value of the licensed premises. The maximum duty used to be 60*l.* no matter what was the value of the house. The new Act substituted a system of charging which in the case of the full publican's licence is strictly in proportion to the value of the licensed premises. That is not so, however, in the case of other duties, such as those on manufacturers' and wholesale dealers' licences. That explains the use in the Revenue Act, s. 8, sub-s. 1, of the expression "duty on any excise licence charged by reference to annual value." It aptly refers to the duty in the case of the full publican's licence. That sub-section was inserted in the Act in order to remedy the hardship occasioned by the decision of Channell J. in *Wrigglesworth* v. *Rex* (1), that in calculating the annual value under s. 44, sub-s. 1, of the Act of 1910 no deduction could be made in respect of the duty payable on the licence. Sect. 44, sub-s. 2, has nothing whatever to do with that. It is primarily concerned with the creation of a register for future use, and not merely for the purposes of taxation. If the appellants' view were correct the passing of s. 8, sub-s. 1, of the Revenue Act, 1911, would have destroyed the value of the register. Under Sched. I. of the Act of 1910, "Provisions applicable to retailers' on-licences." No. 3, an option is given to the licence-holder to pay one third of the annual licence value. When he exercises that option he is not paying a duty calculated by reference to annual value, but by reference to the annual licence value which is given in the register, and there is nothing in the Act of 1911 which interferes with his position in the least.

With reference to the other point, namely, as to the effect of the provision with regard to the sale of non-intoxicants in the proviso to sub-s. 2 of s. 44, there are three elements of value which go to make up the value of a licensed hotel—(1.) profits derived from the sale of intoxicants; (2.) profits which would be made equally whether the premises were licensed or not, e.g., profits arising from the letting of rooms; and (3.) the increased

(1) (1910) 75 J. P. 118.

value in respect of profits arising from the sale of non-intoxicants on premises which are licensed, but which profits would not be earned if the premises were not licensed. It is the third element of value which is allowed to be deducted from the value of the premises as licensed in calculating the annual licence value, the object being not to discourage the sale of non-intoxicants. If the appellants' view be right, it will involve the deduction twice over of the profits derived from the sale of non-intoxicants which would have been obtained even if the premises were not licensed, first, as an element in the annual value of the premises without a licence, and, secondly, by way of special deduction under the proviso. The proviso was intended to apply to cases where the licence is merely ancillary to the main business carried on upon the premises.

There is a further point upon which the respondents desire to appeal from the decision of Hamilton J. He held that the application of the proviso was not restricted to hotels or similar premises, the ejusdem generis rule not being applicable in construing the words "hotels or other premises." He thought the word "or" was used in an adversative sense. On that point it is submitted that his judgment was wrong. A distinction has long been recognized in the Licensing Acts between hotels and public-houses. Sect. 14 of the Licensing Act, 1910, affords an instance. In Sched. III. of the Licensing (Consolidation) Act, 1910, the rate of charge for the compensation levy was reduced in the case of hotels and in the case of licensed premises used for any purposes to which the holding of a licence is merely auxiliary. It is to such premises that the expression "hotels or other premises" in s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, was intended to refer. The ejusdem generis rule ought to be applied in construing this expression: *In re Clark, Ex parte Schulze* (1); *Harris* v. *De Pinna* (2); *In re Stockport Ragged, Industrial and Reformatory Schools* (3); *Attorney-General* v. *Seccombe*. (4) Hamilton J. was wrong on this point, but his order was right and should be allowed to stand.

Sir A. Cripps, K.C., in reply.

Cur. adv. vult.

(1) [1898] 2 Q. B. 330, 336.
(2) (1886) 33 Ch. D. 238, 246.
(3) [1898] 2 Ch. 687, 696.
(4) [1911] 2 K. B. 688, 701.

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July 20. COZENS-HARDY M.R. I have had the advantage of reading and considering the judgment which Farwell L.J. is about to read: I agree with it, and do not desire to add anything to it.

FARWELL L.J. The first question in this appeal depends on the construction of ss. 43 and 44 of the Finance (1909-10) Act, 1910, and s. 8 of the Revenue Act, 1911.

I entirely agree with Hamilton J.'s reasoning and conclusion on this, and will only add that the admission that the publican's licence value in sub-s. 1 of s. 44 is different and distinct from the compensation value in sub-s. 3 renders it quite impossible to hold that the substitution by the Act of 1911 of inhabited house duty for publican's licence value can have any effect on the compensation value.

The second question is, however, one of more difficulty. The object of s. 44, sub-s. 2, is to enable the preparation and continuance of a correct register of "the annual licence value" of all fully licensed premises and all beer-houses. This register is not apparently intended for immediate use, but is established presumably with a view to future legislation. It is common knowledge that recent legislation in relation to licensed houses has been directed to the reduction of their number in the interests of temperance; provision was made in 1904 for the gradual suppression of superfluous houses and for compensating the owners of the suppressed houses out of funds provided by the owners of the surviving houses; and more recently heavy taxes have been placed upon licensed houses and their owners with a view not only to raise money, but also to discourage the sale of intoxicants. It has, however, been recognized throughout that houses of refreshment apart from the sale of intoxicants are necessary for the comfort and wellbeing of the general public, and it is a legitimate inference to draw, in construing an Act like the present, that the intention of the Legislature is not to mulct the licensed victualler personally by way of punishment, but to check and discourage his trade in intoxicants and to encourage the necessary and beneficial kindred trade of catering for the public by the supply of food and non-intoxicants. It is obvious that this must

be so, for it would be intolerable that very heavy taxes should be levied on individuals who supply the public with daily necessaries of food and drink when there is no question of intoxicants involved; the necessary result would be that the community would bear the burden, and would find their food and drink taxed to excess.

Now, under present circumstances, the value of licensed premises for the purpose of compensation rests on their saleable value, and is estimated by considering (amongst other things) the trade of all sorts done therein, whether in intoxicants or non-intoxicants, and aggregating them; and rightly so, because the value to the extruded publican depends on such entirety. Where, however, the question of extra taxation on the monopoly value—that is, on the value of the yearly licence to sell intoxicants granted by the State, and which the Legislature has on that ground felt justified in taxing very highly—arises, different considerations come into play: the basis of taxation in such a case is the value arising from the profits derived from the sale of the obnoxious intoxicants.

I have already said that it is not a mere question of extracting the largest amount of money possible: it is a question also, and perhaps to a greater extent, of discouraging the sale of intoxicants and encouraging that of food and non-intoxicants. Take the case of a beer-house in the country, with a drinking bar and no other accommodation: the Legislature regards it as a mere means for the sale of intoxicants, and therefore objectionable, and taxes it accordingly; but if the owner builds on a dining-room in which no intoxicants are served except with meals, but only food, or non-intoxicants with or without food, the beer-house becomes in great measure unobjectionable, and indeed useful and beneficial to the public. The publican, if he sells his new house, will find its value increased by reason of the profits derived from the sale of food and non-intoxicants. It is therefore in accordance with the general aim and object of the Legislature to which I have already referred that it should provide in sub-s. 2 (*d*): "In estimating for that purpose the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration."

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The case is, of course, the same, whether the accommodation for selling non-intoxicants already exists or is added de novo; but the increase is more apparent if the illustration of a new building is taken. But it is said that this, which appears to me to be the fair and obvious construction, cannot be correct, because "the annual value of the premises as licensed premises" is ascertained for the purpose of deducting from it the hypothetical value which they would bear if they were not licensed premises, and so arriving at the annual licence value as the basis of taxation. It is said that the result of the suggested construction will be that the licence-holder will have the same sum deducted twice over, and that this may be unfair on the Exchequer, and may be unfair on the publican also, if the register should hereafter be used as the basis of compensation. But in my opinion this method of argument is misleading, and the ingenious calculations by addition and subtraction of the Solicitor-General merely darken counsel. The Legislature knew the difficulties of assessing the various items that go to make up value, and the proviso to sub-s. 2 was intended, in my opinion, to avoid all those difficulties by the simple direction to the valuers to be careful that in estimating value they are on no account to take into consideration any increased value arising from profits not derived from the sale of intoxicating liquors. There is no question of first adding and then subtracting, no item of profit from non-intoxicants is to be taken into consideration at all. But even on the Solicitor-General's own argument, it is a fallacy to say that the same sum is deducted twice over. The amount deducted under this sub-section is the increased value arising from actual profits; the other sum deducted is a purely hypothetical amount based on the supposition that the premises are not licensed or in actual use at all. In one case a going concern is valued as such, in the other a building apart from trade is valued by itself. It is, of course, conceivable that in ascertaining such hypothetical amount, and for that purpose regarding the premises as capable of being used for the purpose (not being licensed premises) for which they are best adapted, a temperance eating-house might appear most suitable, but even in that case the deduction would be ascertained on entirely different principles, the basis under this sub-section being

actual figures in an existing business, the basis in the other being merely an estimate of probabilities without any actual data. The value of the house by itself without any actual trade is a totally different thing from the value of the same house as a going concern, and none the less because the house may be well adapted for carrying on part of the trade actually carried on there.

As to the second objection, I do not know for what purpose the register is being formed, but I quite agree with the Solicitor-General that it would be very unfair to take it as a basis of compensation, and I can hardly suppose that the Legislature would perpetrate so manifest an injustice. The principles applicable to taxation of the monopoly in intoxicants and to compensation for deprival of a business of which part only consists of such monopoly are entirely different; and when it is remembered that licence value on the register is arrived at by deducting the hypothetical value from the compensation value, the result cannot, without manifest injustice, be deemed to be the compensation value: it is by its very terms the compensation value minus *x*.

It is of course possible that the deductions might reduce the annual licence value to nothing: but this has been foreseen and is provided for by the imposition of a minimum duty in such cases.

But there is a further reason for my opinion. There is no other practical meaning to be attached to the proviso. The Solicitor-General argues that the increased value arising from profits not derived from the sale of intoxicants does not mean from the sale of food or non-intoxicants generally, but from the higher price which he alleges that publicans obtain for non-intoxicants because they are sold in licensed premises.

Assuming that some such higher prices are obtained in some cases, it is certainly not proved, and I do not believe, that it is always the case or that the higher amounts charged by publicans are always the same. I should very much doubt if the soda-water supplied with whisky at the Carlton was charged at the same amount as in a country inn. But how is the higher price, if any, to be ascertained, and with what is it to be contrasted

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so as to shew that there is an increase? The Solicitor-General's expert witness, Mr. Marks, says that each case must be dealt with separately and on its own merits; but what a shocking burden in time, trouble, and money is thus placed on the publicans every year. On my construction of the Act, the deduction appears readily and simply on the publican's own books; on the construction of the Crown, it is a question to be ascertained by evidence, with the inevitable disputes and waste of time and money resulting from an inquiry which I can only characterize as fantastic. This practical difficulty is so insuperable that the Solicitor-General did not attempt to meet it in his argument. The Solicitor-General relied on s. 45, but I do not think that it helps him. Sect. 43, read with the schedule, imposes the enormous duty of 50 per cent. of the annual value of the licensed premises for a spirit licence, and 33⅓ per cent. for a beer licence; but the amount of such annual value is reduced by eliminating from it the elements of profit derived from sources other than the sale of intoxicants. But even so, in the case of the large residential hotels and restaurants, many of them rated at thousands of pounds per annum, the duty was so large that a further concession is made to them under s. 45; but even then with a minimum not by way of deduction of annual value as before, but by way of reduction of duty. I fail to see on what principle of construction this reduction in certain cases can be used to cut down or alter the meaning of the prior section which applies to all licence-holders, whether residential hotel or restaurant keepers. Even if these latter get a reduction in the rate of duty, it is no ground for restricting the generality of the words reducing the annual value in all cases where anything besides intoxicants contributes to the profits. For the purposes of s. 43, there is first of all the annual value measured by profits derived from intoxicants, and then in many, if not in most cases, the increased value arising from profits on other things than intoxicants. This applies to all alike; and then s. 45 makes a special and further concession, not in annual value, but by way of reduction of the amount of the duty; but this is applicable only to a limited class of licence-holders. In a taxing Act like the present we can only take the fair meaning of

the words, and cannot speculate as to the intention of the Legislature, founded on an argument that they could never have intended to make so large a reduction.

I have therefore come to the conclusion that the true construction of the proviso is its natural meaning, and I am unable to agree with Hamilton J. in this respect. On the third point, however, I entirely agree with him. I think it is impossible to cut down "hotels or other licensed premises" to "licensed premises like hotels." The whole scope and object of the exception extends to all licensed premises alike, and this is the natural category. There is no ground for putting hotels in this respect on a different footing from other licensed premises: and I do not know what premises would answer the description of "not an hotel, but something of or appertaining to the nature of an hotel."

In my opinion the reference to the schedule in another Act is not legitimate for the purpose of construing this Act; but if it were, it would, in my opinion, be adverse to the appellants.

In my opinion this appeal should be allowed on the second point, and there should be no costs either of this appeal or in the Court below.

KENNEDY L.J. Three distinct questions were argued before us on the hearing of the appeal against the judgment of Hamilton J. in this case.

The first of the three arises on a contention of the appellants. That contention is that s. 8 of the Revenue Act, 1911, operates, not only in regard to the duty on any excise licence charged, as the publican's is charged, by reference to annual value, to repeal s. 44, sub-s. 1, of the Finance (1909-10) Act, 1910, and, for the purpose of the duty in the case of such premises as those of the appellants, to substitute inhabited house duty for the computation of annual value as prescribed, according to the judgment of Channell J. in *Wrightson v. Hull* (1), in the repealed sub-section, but also to affect s. 44, sub-s. 2, of the last-mentioned statute, and to import into that sub-section inhabited house duty value in lieu of "the annual value of the premises as licensed premises" mentioned in that sub-section. It appears to me that Hamilton J.

(1) 75 J. P. 118.

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was perfectly right in rejecting this contention of the appellants, and that, for the reasons stated in his judgment and in the argument addressed to us by the learned Solicitor-General, it is so plainly an untenable contention as to render it needless for me to deal further with this matter of appeal. I have only to add that, this contention failing, there is no ground for questioning the figure found by Hamilton J. for the annual value of the appellants' premises as licensed premises, as well as the value which the premises would bear if they were not licensed premises.

The second question raised on the appeal is a question of the correctness of Hamilton J.'s judgment on a point of construction which is raised by the respondents. It is argued on behalf of the Crown in regard to the proviso at the close of the Finance (1909-10) Act, 1910, s. 44, sub-s. 2, that the words "hotels or other premises used for purposes other than the sale of intoxicating liquors" ought to be construed according to the rule of ejusdem generis, with the result that the proviso would be applicable only to hotels and to such licensed premises as were of the same nature as hotels. Inasmuch as the appellants' licensed premises, the Eagle public-house, are in no sense of the nature of an hotel, such a construction would conclude this appeal; for the third and remaining question, with which I shall deal presently, relates to the effect of this proviso upon the body of s. 44, sub-s. 2. I am, however, upon the whole of opinion that Hamilton J. was right in rejecting the ejusdem generis construction. Why the Legislature, in passing the proviso, instead of simply saying "premises" used the expression "hotels or other premises," I must confess myself unable to understand. But, on the other hand, I feel an insuperable difficulty in formulating such a category of licensed premises which are not hotels, but yet are in the nature of hotels, as the contention on behalf of the Crown would require; and the suggested expansion of the words "other premises" into "premises in which the licence is a mere ancillary element in the business carried on there" appears to me to be something which could not be justified by any canon of construction.

The third and last question for our consideration is one of

some difficulty. What effect is to be given to this proviso in arriving at the annual licence value which is, according to the first part of the body of s. 44, sub-s. 2, to appear in the register which it is the duty of the Commissioners of Excise to prepare and keep corrected, and which is, according to the second part of the body of the same sub-section, to be fixed and certified for the purposes of the Act by the Commissioners of Inland Revenue?

There can be no doubt as to the meaning of the material parts of the body of this sub-section, considered apart from the proviso. The main purpose (and it is most important to remember this) is to create a register shewing the annual licence value of all fully licensed premises and beer-houses. The first words of the section state that purpose. The sub-section then proceeds to enact how that annual licence value is to be ascertained, which is by deducting from the annual value of the premises as licensed premises (without including anything for depreciation of trade fixtures) the annual value which the premises would bear if they were not licensed premises, both values being calculated on the same basis as that of the amount to be paid as compensation under s. 2 of the Licensing Act, 1904. The latter part of the body of the sub-section relates to the fixing and certifying of the annual licence value, when so computed, and of the two annual values used in this computation by the Commissioners of Inland Revenue, and to the provision of a right of appeal if the licence-holder or other persons interested wish to challenge the correctness of the certificate. It does not affect the question which we have to consider in this case.

Assuming then that we have calculated on the prescribed basis the annual value, which I will call A, of the premises as licensed premises, and the annual value, which I will call B, of the premises without the licence, we shall arrive at the annual licence value, which I will call C, without difficulty, by simply subtracting B from A. But then comes the proviso: "In estimating for that purpose the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration." It is clear—at any rate both sides in the argument before us assumed

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it to be clear—that this proviso means that, before you deduct B from A, you must deduct something from A. What is that something? In order to appreciate the issue between the parties on this point, it is useful, I think, to see exactly out of what elements of profit A, the annual value of the premises as licensed premises, really arises. Prima facie, those elements would appear to be two in number, namely, (1.) the profits arising from the sale of intoxicating liquors, (2.) the profits arising from the sale of non-intoxicants in the shape of food and drink, and also, in the case of hotels and inns, where guests are accommodated with rooms, from the profit made upon the supply of such accommodation. In the case of hotels and inns of any size, it must borne in mind that element (2.) is larger than element (1.), and in the case of large hotels it is far greater. But in truth, this second element of profit, as was proved as a matter of fact to the satisfaction of Hamilton J. by evidence in this case, is itself really a composite element. There is a profit to the hotel-keeper from the rooms which he lets, and from the food and non-intoxicant drink which he sells, which he would get from the letting of the rooms and the sale of non-intoxicant food and drink, even if he had no licence; and there is, beyond this profit, an enhanced or increased profit, which he owes entirely to the fact that the premises are licensed premises: because the guest who lives in the room and the guest who eats the food and drinks the non-intoxicant liquor is willing to pay more for his enjoyment of his room or for his non-intoxicant refreshment, on account of the advantage of being housed or fed, as the case may be, in premises where he can get for himself, or for friends he may entertain, spirituous liquors also.

It is contended by the Crown that it is this element of increased value which the Legislature, in order, we may presume, to encourage the provision in licensed premises of accommodation for travellers, and the sale in licensed premises of food and non-intoxicant liquors, has intended to allow, wherever it is found, as a deduction from A, the annual value of the premises as licensed premises, before subtracting from A the annual value, B, which the premises would bear if they were not licensed premises.

The appellants, on the other hand, contend that the true effect

and meaning of the proviso is that, before you deduct B from A, you must deduct from A all the value that arises from profits not derived from the sale of intoxicating liquor.

My brother Hamilton, after most carefully and elaborately considering this question, came to the conclusion that this contention of the appellants is wrong and cannot be maintained; and I think that his judgment on the point is the right judgment.

In the first place, I think that, as the Solicitor-General pointed out with force, the construction put upon the proviso by the appellants does not give its natural and proper force to the word "increased." They would deduct from A all the value arising from profits not derived from the sale of intoxicating liquor; and not merely, in the terms of the proviso, the increased value.

In the second place, the appellants' construction of the proviso in effect, deducts from A twice over that part of A which represents the annual value from non-intoxicant business. For B, the annual value of the premises without the licence, whilst it may be larger than the value arising from the profits of the non-intoxicant business, cannot be less, because, of course, it is only if the premises, when deprived of the licence, can be put to a more profitable use than the continuance of the non-intoxicant business hitherto carried on in them, that they will cease to be used for that non-intoxicant business.

Therefore, as it appears to me, and as it appeared to the learned judge in the Court below, if you deduct from A first of all the value derived from non-intoxicant business, as the appellants argue that the proviso directs you to do, and then deduct B, the value of the premises without the licence, as undoubtedly the subsection does direct you to do, you are virtually deducting from A the same twice over. In other words, if you deduct from A, the annual value of the premises with the licence, B, the value of the premises without the licence (and it is this deduction which the section directs you to make), you will have in fact literally done what the appellants, by their construction of the proviso, invite the Court to hold must be done over again, namely, deducted the value of the premises as premises profitably used for a non-intoxicant business.

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Thirdly, although I am not inclined to lay great stress upon this point, it does not seem likely, if the intention of the Legislature may be considered, that it would, in arriving at the annual licence value in s. 44, sub-s. 2, insert a proviso, as the appellants ask the Court to interpret it, which would unquestionably have its greatest effect in favour of large hotels and restaurants by reducing the annual licence value in their case to a small and possibly even to a minus quantity, and then in addition give that special class of hotels and restaurants the reduction of duty provided for by s. 45, based upon the relative extent of their business in intoxicants and their business in non-intoxicants.

For these reasons the interpretation of the proviso as the respondents construe it seems to me to be at least a preferable interpretation. It gives full force to the words "increased value," and it serves the end which must be conceived to be the end which the Legislature had in view, namely, to arrive at and register that which is the true annual licence value computed on the compensation basis. If the increased value arising from the special profit made by the licence-holder on non-intoxicant business, as well as and in addition to the general profit on non-intoxicants which, if I may be allowed the phrase, is represented by the annual value of the premises as unlicensed, had not been deducted, as, according to the proviso as interpreted by the respondents, it ought to be deducted, from the annual value of the premises as licensed premises, it might perhaps reasonably have been objected, on behalf of the licence-holder, that the annual licence value which it is the purpose of s. 44, sub-s. 2, to arrive at and register, and which is made by the statute the basis of options under s. 45 and the First Schedule (Provisions applicable to retailers' on-licences), s. 3, included a value in part derived from non-intoxicant business. The interpretation put upon the proviso by the respondents gives to it this useful effect of preventing the possibility of any such objection.

In this particular case the amount of the deduction which, on the appellants' construction, should be made from the annual value of the licensed premises as licensed premises is small - only 97*l*. The Eagle is essentially a public-house, although, as the learned judge has found, some refreshment of a non-

intoxicant character forms part of the business done in this house. But this, I understand, is to be taken as a test case, and the question of principle is one of great practical importance, because, as I have already said, if the appellants' view is correct, the annual licence value in the case of hotels of any considerable size will be very materially affected. Indeed, in the case of hotels of any size, in which the far larger part of the profits arises from other sources than the consumption of intoxicant liquors, the result of adopting the appellants' application of the proviso would, by reducing the annual licence value to zero, or almost zero, if not to a minus quantity, have the effect that the section, so far as its main purpose is concerned, that is creating a register of licence value, becomes impossible; and it is no answer of any sort to say that in regard to the subsidiary object, namely, the calculation of excise duty, a minimum is provided by the statute.

I have felt it, therefore, as this is a question of principle, to be a duty to express my views on this particular point in the case for our decision on this appeal at greater length than I should otherwise have felt to be justifiable after the very clear and careful judgment delivered by the learned judge in the Court below, with which I agree.

Appeal allowed on second point.

Solicitors for appellants: *Godden, Son & Holme.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

G. A. S.

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July 25.

REX *v.* GOVERNOR OF BRIXTON PRISON.
Ex parte STALLMANN.

Criminal Law—Habeas Corpus—Second Writ—Grounds of Detention of Prisoner—Extradition—"Trial and discharge" of Prisoner—Subsequent Proceedings for Extradition—Obtaining Money by False Pretences—Money won by Cheating at Cards—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 6—*Extradition Treaty with Germany*, 1872, *Articles II., IV., and XV.*—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

Sect. 6 of the Habeas Corpus Act, 1679, only applies where the return to the second writ of habeas corpus raises for the opinion of the Court the same question with regard to the validity of the grounds of detention as the first.

Therefore, where a prisoner, a German subject, was discharged from custody upon directions given by a High Court of Judicature in India in the nature of habeas corpus on the ground that his detention was illegal in consequence of an informality in the course of proceedings before a magistrate for the extradition of the prisoner from India to Germany :—

Held, that he could be re-arrested in England and committed by a magistrate for extradition to Germany in proceedings validly conducted before him upon the same charge as that which formed the subject of the invalid extradition proceedings in India.

By article IV. of the Extradition Treaty with Germany, 1872, extradition is not to take place if the person claimed has already been "tried and discharged" :—

Held, that the prisoner had not been "tried and discharged" in India, inasmuch as the word "tried" in the treaty is used in the strict sense of the term, and does not include a preliminary investigation as to whether there is sufficient evidence for extradition.

By article II. of the Treaty of 1872 the crimes for which extradition is to be granted are (inter alia) obtaining money or goods by false pretences.

By the Gaming Act, 1845, s. 17, a person who by any fraud in playing at cards wins from any other person any sum of money or valuable thing is to be deemed guilty of obtaining the money or valuable thing by a false pretence with intent to cheat or defraud the other person.

The prisoner was charged with obtaining money and goods by false pretences from D. There was evidence that the prisoner, D., and a third person played a game of cards at which the prisoner and the third person in collusion cheated D. As the result of the play a sum of 80,000 marks (about 4000*l.*) was won from D. by the third person. The third person drew some blank bill forms out of his pocket, and the prisoner requested D. to accept one. D. accordingly wrote his acceptance upon

it, and it was subsequently signed by the third party as drawer and indorsed by him and the prisoner:—

Held, that there was evidence upon which the prisoner could properly be charged with obtaining money and goods by false pretences, and that as that crime is included in the Extradition Treaty with Germany, 1872, an order could be made for the extradition of the prisoner from England to Germany.

Reg. v. *Danger* (1857) 1 Dears. & B. C. C. 307, considered and distinguished.

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REX

GOVERNOR OF BRIXTON PRISON

STALLMANN. *Ex parte.*

RULE NISI granted upon an application on behalf of Rudolf Stallmann calling upon the governor of His Majesty's Prison at Brixton to shew cause why a writ of habeas corpus should not issue directed to him to have the body of the applicant immediately before this Court to undergo and receive all and singular such matters and things as this Court should then and there consider of and concerning him in that behalf.

The prisoner had been committed to the custody of the governor of Brixton Prison under a warrant of committal for extradition to Germany hereinafter mentioned and dated July 1, 1912, issued by Mr. Curtis Bennett, a metropolitan magistrate.

The following facts appeared from the depositions taken before the investigating magistrate in Berlin and affidavits which had been made in the course of the proceedings against the prisoner. On June 1, 1910, Lieutenant von Dippe, of the 10th Hussar Regiment of Stendal, went by train from Stendal to Berlin, and on the way in the dining car met a person who had previously been introduced to him as von Henrichs at a horse race meeting at Magdeburg by an acquaintance, and who on June 1, 1910, was passing under that name. This was all the knowledge Lieutenant von Dippe had of the so-called von Henrichs. They continued their journey in each other's company to Berlin, where von Henrichs invited Lieutenant von Dippe to come with him to the Hotel Furstenhof. At the railway station at Berlin they met a third person whom von Henrichs introduced to Lieutenant von Dippe as "von Konig." Until that introduction von Konig had been completely unknown to Lieutenant von Dippe. "Von Konig" was in fact the prisoner Rudolf Stallmann. At the Hotel Furstenhof all three lunched together. Champagne was drunk, and von Henrichs and the prisoner kept on

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drinking to von Dippe. The lunch lasted from about 2 until 4 o'clock. They drank very heavily. After the lunch von Dippe was invited to drink coffee in a room upstairs. There both coffee and cognac were drunk. The three talked about the game of bridge, and the prisoner wished to shew von Dippe the game and ordered the waiter to bring up at least two packs of cards. While von Dippe was considering a game of bridge, which the prisoner had shewn him with one of the packs of cards, the other two occupied themselves with the game of rouge et noir. Von Henrichs betted the prisoner about 100 francs that he would win a game of rouge et noir. They then began to play, but did not pay winnings or losses, but noted them down. When this had continued for some time the prisoner asked von Dippe to help him. The game was played in the following manner. Von Henrichs held the bank, that is, he had the pack of cards in front of him, and kept drawing a single card. The prisoner put any amount he chose upon the chance whether the card thrown down by von Henrichs was a red card or a black one. Amounts of various magnitude were laid, among others of 5000 marks and upwards. The whole amount in the bank was considered to be stakes, that is, the amount which the keeper of the bank had noted as won for himself. Von Dippe helped the prisoner by advising the laying of a certain amount or the whole bank. The bank holder von Henrichs lost when the amounts were small, but always won when the amounts were large, e.g., of about 5000 marks, and particularly when the bank was put on. When the prisoner and von Henrichs were playing with one another the amounts staked were small, but they became high when von Dippe took part in the game. Play continued until von Henrichs had drawn the pack of cards once completely and once half. Then it was ascertained that an amount of 80,000 marks was noted as won for the bank. Thereupon the prisoner jumped up and exclaimed that that was too high for him and tore up the cards into small pieces. At the beginning von Dippe assumed that he was only to help the prisoner with his advice and that it was only a matter of deciding the bets and that the money was not really being staked, but during the play the prisoner told von Dippe that if

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he took part in the play he would have to bear the costs, that is, be responsible for the loss. In the course of about a quarter of an hour Lieutenant von Dippe and the prisoner had each lost 80,000 marks. After the prisoner had turn up the cards a discussion took place between him, von Henrichs, and von Dippe as to how the matter was to be settled. Von Henrichs drew some blank bill forms out of his pocket, and the prisoner accepted one for 80,000 marks and requested von Dippe to do the same. Thereupon von Dippe wrote his acceptance on another of the blank bill forms. The bill form accepted by von Dippe when ultimately completed was as follows:—

"First exchange
accepted
Eighty thousand marks
v. Dippe.

"Berlin, the second June 1910 for 80,000 marks. Pay at sight for this first of exchange to the order of myself the sum of eighty thousand marks value received and place it to account according to advice.

Lieut. G. von Dippe.

No. of Stendal H. v. Henrichs

Payable at the Deutsche Bank,
Head Office, Berlin."

Upon the back of the bill were the following stamps and indorsements:—

A German bill stamp 30.00 marks of more than 50,000 up to 60,000 marks.

the 2nd June, 1910.

A German bill stamp 10.00 marks of more than 19,000 up to 20,000 marks.

the 2nd June, 1910.

"Payez a l'ordre de Monsieur R. v. Konig en compte

"R. v. Henrichs.

"To the order of Mr. N. Newton.

"Value received

"R. v. Konig."

Von Dippe wrote the words "Accepted eighty thousand marks v. Dippe" upon the bill, the rest of its contents being written by von Henrichs after it had been accepted by von Dippe, except the words "Payable at the Deutsche Bank, Head Office, Berlin." Those words were not on the bill when accepted by von Dippe.

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Nothing had been said about the bill being payable at the Deutsche Bank before von Dippe accepted it. At the time the bill was accepted it was not stamped. This bill was subsequently indorsed by von Henrichs to the prisoner, who purported to indorse it to one Noel Newton, and on September 2, 1910, wrote to von Dippe from Paris informing him that the bill had been so indorsed. Shortly afterwards Newton approached von Dippe, who was then at some military manœuvres, and asked him for payment of the bill, but von Dippe declined to pay the bill and communicated with his advocate in Berlin, as he considered that he had been cheated. The police at Berlin took the bill away from Newton.

The charge of forgery against the prisoner was based upon his having indorsed the bill "R. v. Konig" and placed on it the words as to the place of payment, and having afterwards caused the bill so indorsed to be produced to von Dippe in Germany by Newton for the purpose of obtaining payment.

Evidence was also given before the investigating magistrate at Berlin by an expert named Hans von Manteuffel, who was engaged in the special branch of the police at Berlin which deals with games of chance and cheating at play. He said that the prisoner had been known for years as an international gaming cheat. He described how the game of rouge et noir was played and how it was made use of for purposes of cheating. He stated that the colour of the cards drawn by the banker decided whether the person playing won or lost. The colour of the cards was recognizable by the cheat either by the design on the back or in some other way. He also gave his reasons for thinking that von Dippe had been cheated.

A warrant was issued in Germany for the arrest of the prisoner, which, so far as material, was as follows:—"The commercial assistant Rudolf Stallmann who calls himself Baron von Konig or Baron Korff von Konig, born on the 14th April, 1871, at Berlin, in the kingdom of Prussia, a Prussian subject . . . . is to be arrested for examination on account of strong suspicion of fraud, and of aggravated forgery of documents."

A requisition having been made on October 25, 1910, by the German Government for the extradition of the prisoner, a

metropolitan magistrate, Mr. Curtis Bennett, sitting at Bow Street, on November 12, 1910, issued a warrant for the arrest of the applicant, which so far as material was as follows:—

"To all and each of the Constables of the Metropolitan Police Force.

"Whereas it has been shewn to the undersigned, one of the magistrates of the police courts of the metropolis sitting at the Bow Street Police Court, in the county of London, and within the Metropolitan Police district, that Rudolf Stallmann (hereinafter called the defendant) late of Berlin is suspected and accused of the commission of the crime of obtaining money and goods by false pretences within the jurisdiction of the German Government.

"This is therefore to command you in His Majesty's name forthwith to apprehend the said defendant and to bring him before me or some other magistrate sitting at this Court, to be further dealt with according to law, for which this shall be your warrant."

Shortly after the commission of the alleged offence the prisoner left Berlin and proceeded, after having visited places upon the Continent of Europe, to India, and while the vessel in which he was was going up the river Hugli on her way to the port of Calcutta he was, upon April 26, 1911, arrested upon a warrant issued by a magistrate of Alipore upon a requisition made by the German Government on or about November 12, 1910, claiming an order for his extradition for that he was suspected and accused of the commission of the crime of obtaining money and goods by false pretences.

The warrant (so far as material) was as follows:—

"To Superintendent Ellis, Calcutta Police.

"Whereas, Rudolf Stallmann . . . . of the s.s. *Caspian* River Hugli, Diamond Harbour, stands charged with the offence of obtaining money under false pretences at Berlin, Germany, and information has been laid before me justifying his arrest. You are hereby directed to arrest the said Rudolf Stallmann . . . ."

He was taken before the magistrate at Alipore. Before the magistrate the prisoner, by his advocate, at the close of the case for the prosecution on May 24, 1911, applied for an adjournment

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for a fortnight in order that evidence which had been sent for to England but which had not arrived might be presented by him to the magistrate by way of defence. The magistrate, however, declined to grant any adjournment. He concluded the inquiry and found that a prima facie case had been made out against the prisoner, and he made a report to that effect to the Government of India in accordance with the provision of s. 3, sub-s. 6, of the Indian Extradition Act, 1903. The Government of India, acting upon that report, issued a warrant on August 1, 1911, for the custody and removal of the prisoner under s. 3, sub-s. 8, of that Act for the purpose of being extradited to Germany.

While he was so in prison the prisoner moved the High Court of Calcutta and obtained a rule ordering his body to be produced in Court. On August 11, 1911, the rule came on for argument, and in the result (the arguments having lasted six days) the Court on August 21, 1911, gave judgment discharging the order of the magistrate and giving the prisoner his liberty under s. 491, sub-s. 1 (*b*), of the Indian Code of Criminal Procedure, 1898. (1)

The High Court of Calcutta decided that there was a prima facie case established against the prisoner, but that, inasmuch as the magistrate had declined to give him a fair and reasonable opportunity of obtaining his evidence from England in order to present to the magistrate an answer to the prima facie case against him, the magistrate's order could not be sustained, and they therefore quashed that order and discharged the prisoner. In giving judgment Woodroffe J. said (2): "The Act" (i.e., the Indian Extradition Act, 1903 (3)) "requires that during such

(1) Indian Code of Criminal Procedure, 1898 (Act V. of 1898), s. 491, sub-s. 1:

Power to issue directions of the nature of a habeas corpus.

"Any of the High Courts of Judicature at Fort William, Madras and Bombay may, whenever it thinks fit, direct—

. . . . .

"(*b*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty."

(2) Vide *In re Rudolf Stallmann* (1911) I. L. R. 39 Calc. 164, at pp. 195, 196.

(3) Indian Extradition Act, 1903 (XV. of 1903), s. 3, sub-s. 3: "When such criminal appears or is brought before the magistrate, the magistrate shall inquire into the case in the same manner

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inquiry evidence which may be produced on behalf of the fugitive criminal shall be received. This, as I have held, involves that a reasonable opportunity should be given in the judicial discretion of the magistrate. In the present case the magistrate refused such an opportunity for reasons which I hold are untenable. The result, therefore, is that the inquiry was not according to law and the issue of the warrant upon such an inquiry was itself invalid . . . . I must therefore hold that the extradition warrant is invalid . . . . because, though there is evidence of an offence, the applicant was given no opportunity of defence. I hold that the applicant has been illegally detained thereunder and direct that he be set at liberty."

The following is a copy (so far as material) of the order made by the Court: — "Upon reading a petition of Rudolf Stallmann . . . . and a writ of warrant in the nature of a habeas corpus issued by this Court . . . . it is declared that the extradition warrant in the said petition mentioned is invalid and it is ordered that the said Rudolf Stallmann . . . . be and is hereby set at liberty."

The result, therefore, was that the German Government failed before the High Court of Justice in Calcutta. About a fortnight after that judgment had been given the prisoner left India, travelled back to Europe, visited Berlin for a short time, and subsequently came back to England, where he arrived in October, 1911. He remained in the metropolis, and on or about March 29, 1912, he was arrested by a detective under the warrant that had been granted at Bow Street on November 12, 1910. In those circumstances he was brought up at Bow Street Police Court before the magistrate, Mr. Curtis Bennett, and the identical charge upon the identical evidence which had before been submitted to the magistrate in Calcutta was submitted to the magistrate at Bow

and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime."

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Street in support of the application of the German Government for a warrant for his extradition to that country.

It was submitted to the magistrate upon the prisoner's behalf that he could not be again charged upon precisely the same evidence (the evidence in support of the charge was by deposition, namely, the same depositions as those adduced before the magistrate in India) in relation to precisely the same offence, he having been discharged by the High Court of Justice in Calcutta, as it would be contrary to s. 6 of the Habeas Corpus Act, 1679. (1)

The magistrate overruled the objection and decided that as regarded the charge of forgery in von Dippe's case no prima facie case had been made out, but that with regard to the charge of obtaining money and goods from him by false pretences a prima facie case had been made out, and he accordingly committed the prisoner for extradition to Germany upon that charge. The following is a copy (so far as material) of the warrant of committal for extradition:—

"Be it remembered, that on this first day of July in the year of our Lord one thousand nine hundred and twelve Rudolf Stallmann (hereinafter called the defendant) is brought before me, one of the magistrates of the metropolitan police courts, sitting at the police court in Bow Street, within the Metropolitan Police district, to show cause why he should not be surrendered in pursuance of 'The Extradition Act' on the ground of his being accused of the commission of the crime of

(1) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 6: "And for the prevention of unjust vexation by reiterated commitments for the same offence; be it enacted by the authority aforesaid, that no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the legal order and process of such Court wherein he or they shall be bound by recognizance to appear, or other Court having jurisdiction of the cause; and if any other person or persons shall knowingly contrary to this Act recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid."

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obtaining a valuable security by false pretences (Erlangung von Geld oder anderen Sachen durch falsche Vorspiegelungen) within the jurisdiction of the German Government and forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Act

"This is therefore to command you the said constable, in His Majesty's name, forthwith to convey and deliver the body of the said defendant into the custody of the said keeper of His Majesty's prison at Brixton, and you the said keeper to receive the said defendant into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant."

The rule was then obtained at the instance of the prisoner upon the grounds that the prisoner "was arrested for the same offence that he was discharged on habeas corpus in Calcutta; autrefois acquit; article IV. and article XV. of the German Treaty, 1872; no prima facie case; and that the evidence of Manteuffel and von Dippe was inadmissible."

Sir Rufus D. Isaacs, A.-G., Sir John Simon, S.-G., Bodkin, and *Rowlatt* shewed cause. The ground mentioned in the rule nisi that the prisoner has been autrefois acquit does not apply. Article IV. of the Treaty between the United Kingdom and Germany (1) does not apply because the prisoner has not

(1) Extradition Treaty with Germany, 1872 (entitled "Treaty between Her Majesty and the Emperor of Germany for the Mutual Surrender of Fugitive Criminals"): —

ARTICLE II.	ARTIKEL II.
The crimes for which the extradition is to be granted are the following: —	Die strafbaren Handlungen, wegen deren die Auslieferung zu gewähren ist, sind folgende.
. . . .	
(6.) Obtaining money or goods by false pretences.	(6.) Erlangung von Geld oder anderen Sachen durch falsche Vorspiegelungen.
ARTICLE IV.	ARTIKEL IV.
The extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person	Die Auslieferung soll nicht stattfinden, wenn die von einer Regierung des Deutschen Reichs verfolgte Person im Vereinigten

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been "tried and discharged or punished." Article XV. of the treaty so far as it bears on the present case does not affect the question, as it merely applies the stipulations of the treaty to the British Colonies and foreign possessions. As to the evidence of Manteuffel it is not relied upon on behalf of the respondent. Upon the facts there is a prima facie case against the prisoner, and among the crimes for which extradition is to be granted under the treaty of 1872 is "obtaining money or goods by false pretences," which is mentioned in article II., clause 6, of the treaty. The German words of the treaty quite clearly cover a bill of exchange. The proceedings in India upon which the prisoner was released were not strictly an application for a writ of habeas corpus, although they were in the nature of habeas corpus, but it is admitted that this Court must treat them as very analogous to proceedings upon an application for a writ of habeas corpus. They were taken under s. 491, sub-s. 1 (*b*), of the Indian Code of Criminal Procedure, 1898 (Act V. of 1898), which enacts that any of the High Courts of Judicature at Fort William, Madras, and Bombay may, whenever it thinks fit, direct that a person illegally or improperly detained in public or private custody within the limits of its ordinary civil jurisdiction be set at liberty. Sect. 6 of the Habeas Corpus Act,

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claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished, or is still under trial, in one of the States of the German Empire, or in the United Kingdom respectively, for the crime for which his extradition is demanded.

. . . . .

ARTICLE XV.

The stipulations of the present treaty shall be applicable to the Colonies and foreign possessions of Her Britannic Majesty.

. . . . .

Königreich, oder die Seitens der Regierung des Vereinigten Königreichs verfolgte Person in einem der Staaten des Deutschen Reichs wegen derselben strafbaren Handlung, wegen deren die Auslieferung beantragt wird, in Untersuchung gewesen und ausser Verfolgung gesetzt worden, oder sich noch in Untersuchung befindet, oder bereits bestraft worden ist.

. . . . .

ARTIKEL XV.

Die Bestimmungen des gegenwärtigen Vertrages sollen auf die Colonien und auswärtigen Besitzungen Ihrer Grossbritannischen Majestät Anwendung finden.

. . . . .

1679, has a limited application to extradition proceedings: *Attorney-General for Hong Kong* v. *Kwok-a-Sing*. (1) The prisoner was in no sense being tried in India. It is considered in the British Empire as well as in other countries that there should be some inquiry as to whether there is a prima facie case against a prisoner before he is delivered up in extradition proceedings, and that is all that took place in India with regard to the prisoner: *Rex* v. *Governor of Brixton Prison, Ex parte Percival*. (2) Committal for extradition falls far short of committal for trial: *Reg.* v. *Spilsbury*. (3) A person is not imprisoned within the meaning of s. 6 of the Habeas Corpus Act, 1679, who is merely detained in extradition proceedings. The prisoner will not necessarily be committed for trial in Germany.

Danckwerts, K.C., George Elliott, K.C., Curtis Bennett, and *St. John Hutchinson*, in support of the rule. The decision in *Rex* v. *Governor of Brixton Prison, Ex parte Percival* (2) has no application to the present case. The writ of habeas corpus is a common law writ and the right to it does not depend in any way upon extradition treaties: *Ex parte Bisset*. (4) In *Rex* v. *Governor of Holloway Prison, Ex parte Silletti* (5) there was a decision to the same effect. The question in the present case is whether the magistrate at Bow Street had upon the materials before him any jurisdiction to commit for extradition. The High Court in India decided that the magistrate had no jurisdiction to commit the prisoner for extradition without complying with the conditions of the Indian Extradition Act, 1903 (XV. of 1903), and that immediately he committed the prisoner for extradition he was functus officio. The present proceedings raise the same question as that which arose in India, namely, whether there is any prima facie case against the prisoner. The principle upon which the Habeas Corpus Act, 1679, is based is that no person shall be vexed again for the same cause.

The meaning of article IV. of the Extradition Treaty with Germany, 1872, is that a prisoner is not to be extradited

(1) (1873) L. R. 5 P. C. 179.
(2) [1907] 1 K. B. 696.
(3) [1898] 2 Q. B. 615.
(4) (1844) 6 Q. B. 481.
(5) (1902) 87 L. T. 332.

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from Germany if there has previously been an inquiry into the same transaction in one of the States of the German Empire, and that the same rule is to apply where extradition from England is asked for and there has already been an inquiry in another part of the dominions of the British Crown. A very wide meaning must be given to the words "tried and discharged" in article IV. of the treaty, which must be read with article XV. It is not necessary that there should have been a trial in which the prisoner could be punished or acquitted. It is sufficient if there are proceedings in which the prisoner could be discharged. In the interest of the subject a wide meaning ought to be given to the words "tried and discharged." If the Court desires it, the evidence of German lawyers can be given to prove that that is the meaning of the article as it stands in the German language.

There is no evidence of any extraditable crime. The crime in order to be extraditable must be within the treaty of 1872 and within the Extradition Act, 1870. In *In re Arton* (*No.* 2) (1) Lord Russell of Killowen C.J. in delivering the judgment of the Court said: "The conditions of extradition, the fulfilment of which we have in this case to consider, are the following: (1.) the imputed crime must be within the treaty; (2.) it must be a crime against the law of the country demanding extradition; (3.) it must be a crime within the English Extradition Acts, 1870 and 1873; and (4.) there must be such evidence before the committing magistrate as would warrant him in sending the case for trial, if it were an ordinary case in this country." Those conditions apply to the present case, but they are not satisfied inasmuch as there is no evidence against the prisoner of any crime which is extraditable under the treaty of 1872. The Extradition Act, 1870, was applied in the case of Germany by Order in Council dated June, 1872. The warrant of November 12, 1910, upon which the prisoner was arrested in England charged him with having obtained money and goods by false pretences, and he was committed for extradition by the London magistrate upon the charge of obtaining a valuable security by false pretences. There is no evidence

(1) [1896] 1 Q. B. 509.

that money, goods, or a valuable security were obtained by false pretences, and the German Treaty, 1872, does not include the crime of obtaining a valuable security by false pretences. Nor is it included in the list of crimes in the Extradition Act, 1870 (1), for which extradition could be granted. In the Extradition Act, 1873 (2), a new list of extraditable crimes was introduced, including any indictable offence under the Larceny Act,

(1) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2: "Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State. . . . ."

Sect. 10: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit."

Sect. 26: "In this Act, unless the context otherwise requires, –

"The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the First Schedule to this Act."

"FIRST SCHEDULE.

"LIST OF CRIMES.

"The following list of crimes is to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

"Obtaining money or goods by false pretences."

(2) Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 8: "The principal Act shall be construed as if there were included in the First Schedule to that Act the list of crimes contained in the schedule to this Act."

"SCHEDULE.

"LIST OF CRIMES.

"The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

"Any indictable offence under the Larceny Act, 1861, or any Act amending or substituted for the

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1861 (1), not included in the Act of 1870, and amongst those offences is the misdemeanour of obtaining a valuable security by false pretences, mentioned in s. 88 of the Act of 1861. That section was a re-enactment of s. 53 of 7 & 8 Geo. 4, c. 29. Sect. 90 of the Act of 1861 is an amendment of 21 & 22 Vict. c. 47, which made it a misdemeanour to obtain by any false pretence the signature of any person to a valuable security with intent to defraud. In *Reg.* v. *Danger* (2) it was held that the prisoner could not be convicted under s. 53 of 7 & 8 Geo. 4, c. 29 (3), of obtaining a valuable security by false pretences because the bill whilst in the hands of the prosecutor was of no value to him nor to any one else, unless to the prisoner, and the prosecutor had no property in the bill as a security, or even in the paper on which it was written. That decision applies to the present case, where the charge is under s. 88 of the Larceny Act, 1861, which corresponds to s. 53 of 7 & 8 Geo. 4, c. 29. The statute 21 & 22 Vict. c. 47 was passed in consequence of the decision in *Reg.* v. *Danger* (2), and that statute was repealed and amended by s. 90 of the Larceny Act, 1861: *Reg.* v. *Gordon.* (4) The only charge of which it could be reasonably contended there is evidence in the present case would

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same, which is not included in the First Schedule to the principal Act. . . . ."

(1) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 88: "Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour . . . ."

Sect. 90: "Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanour . . . ."

(2) 1 Dears. & B. C. C. 307.

(3) 7 & 8 Geo. 4, c. 29, s. 53: "If any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanour . . . ."

(4) (1889) 23 Q. B. D. 354.

be one under s. 90 of the Larceny Act, 1861. But that offence is not extraditable under the treaty of 1872, and the treaty ought to have been amended if it had been desired to bring an offence under s. 90 of the Act of 1861 within it. The operation of the Extradition Acts is limited by the treaty, and the Order in Council simply gives effect to the treaty. [Greaves on the Criminal Law Consolidation and Amendment Acts, p. 136, and ss. 10 and 26 of the Extradition Act, 1870, were also referred to.]

Sir Rufus D. Isaacs, A.-G., in reply. The decison in *Reg.* v. *Danger* (1) turned upon the point that on the facts in that case there was no property in the prosecutor either in the bill of exchange or the piece of paper on which it was written. But in the present case there was a gift of the piece of paper to the prosecutor, and from the moment he filled it up it became a valuable security. If the prosecutor had destroyed the piece of paper after it was given to him no action would have lain against him. There is therefore evidence of an offence under s. 88 of the Larceny Act, 1861, and it is not necessary to rely on s. 90 of that Act.

Further, at the time the Extradition Treaty of 1872 was entered into the Gaming Act, 1845 (2), was in force, and by s. 17 of that Act any person who by any fraud in playing with cards wins from any other person any sum of money or valuable thing shall be deemed guilty of obtaining such money or valuable thing by a false pretence. There is therefore evidence of an offence under s. 88 of the Larceny Act, 1861.

Danckwerts, K.C. (by leave of the Court). As to the Gaming Act, 1845, the words "shall be deemed" in s. 17 do not mean that a person cheating at cards commits the offence of obtaining

(1) 1 Dears. & B. C. C. 307.

(2) Gaming Act, 1845 (8 & 9 Vict. c. 109) s. 17: "Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, ... or in betting a part in the stakes, wagers, or adventures . . . . of them that do play, ... win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly."

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money by false pretences. They only mean that he is to be punished as if he had obtained the money or valuable thing by false pretences.

Assuming that the prisoner and von Henrichs were acting in concert, they did not win the bill of exchange from von Dippe. The bill was merely given by von Dippe in payment of the 4000*l.* which had been won from him. There was no arrangement that he should accept the bill until after the play was over.

LORD ALVERSTONE C.J. In this case the arguments have ranged over very important points, and I should have been glad, if time had permitted, to put my judgment into writing, but it is quite impossible, having regard to the work we have to do, and to the importance of this matter being speedily dealt with. A rule nisi for a writ of habeas corpus was obtained on behalf of the applicant Rudolf Stallmann calling upon the governor of Brixton Prison to shew cause why he should not be discharged from the warrant under which he was committed to prison to be extradited. The grounds upon which the rule was obtained were, that the applicant had been arrested for the same offence, that he had been discharged on habeas corpus in Calcutta, that article IV. and article XV. of the Extradition Treaty with Germany of 1872 barred the extradition proceedings, that there was no prima facie case, and that the evidence of Manteuffel and von Dippe was inadmissible.

I rather deprecate the practice, when an important point is going to be raised upon a rule, of not stating it specifically but including it generally among other grounds which may involve matters of difficulty; but no doubt counsel for the applicant was entitled to raise the point under the words "no prima facie case."

I will endeavour, briefly and without attempting to state the details at length, to deal with all the points which arise in their order. On October 25, 1910, a requisition was made on behalf of the German Government for the extradition of the applicant from this country to Germany. Between October 25, 1910, and March, 1912, Stallmann, otherwise von Konig, was in India, and a

requisition was made by the German Government for his extradition to England. An application for that purpose was accordingly made to the magistrate in India, who made a report to the Government of India, and, acting upon that report, the Indian Government issued a warrant for his custody with a view to his extradition to Germany. Proceedings in the nature of habeas corpus took place in India, and I desire to say that I do not draw any distinction between habeas corpus proceedings in England and those in the form in which they took place in India. I think in all probability the same law is applicable to them as to habeas corpus, at any rate so far as relates to any point we have to consider; but in the view I take of the effect of those proceedings, and of the law, it is not material to consider at length whether there is or is not any distinction between them and proceedings in habeas corpus.

It appears that under the procedure in India the prisoner was entitled to give evidence in order that there might be a consideration of the facts upon which he could be surrendered; and it was said that the magistrate in India had not given him that opportunity. Upon that ground he took steps to set aside the extradition proceedings, and he raised several points, and, amongst others, the question as to whether there was any evidence against him, and he also raised the point that he had not had an opportunity of giving evidence which he was entitled to give. The High Court of Justice in India decided against him upon the merits and held that there was a prima facie case for him to answer, but that although he had evidence for the defence he was given no opportunity of presenting that evidence, and that he was illegally detained, and directed that he should be released. Therefore, in proceedings analogous to an application for a writ of habeas corpus, the result was that the Indian Court dismissed the application for extradition.

Upon proceedings being taken in England before the magistrate in the early part of 1912 on the warrant which had been issued in England in November, 1910, the point was taken that the prisoner had been discharged from the proceedings in India, and that he could not be re-arrested in respect of the same charge. That contention was based on two main considerations. Reliance was

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placed on the language of s. 6 of the Habeas Corpus Act, 1679. It is quite unnecessary and impossible to deal with all the questions that might arise as to what is covered by that section, but it seems to me that upon the language of that section itself it was never intended to enact that the Court had not the power to make an order which would lead to a person being subsequently committed. In my judgment the section contemplated and intended the preservation of the right of the Court over persons who might be amenable to its jurisdiction, and intended to repress and stop imprisonment which at that time was very commonly without jurisdiction. When one considers that the section imposes a penalty, and enables a person to apply to the Court by a legal process which must appear to that Court to be for good cause, it is impossible to seriously suggest that, as the section contemplates a release from an ordinary commitment, therefore in the present case, because there was some error of procedure which placed the prisoner outside its jurisdiction, he ought to be released now.

It is contended on his behalf that the contrary is assumed in the language of Mellish L.J. in *Attorney-General for Hong Kong* v. *Kwok-a-Sing*. (1) No point of the kind was then before the Court, and I therefore propose to consider whether the judgment of the Court which was delivered by Mellish L.J. went as far as is contended by counsel for the applicant, and whether it really did lay down any such broad proposition. It refers to the fact that there had been a commitment of Kwok-a-Sing for an alleged offence, that he had been in custody and discharged upon a writ of habeas corpus, that he was again arrested in respect of another offence, namely, piracy, and that he was committed to be tried for that second offence but again discharged upon a writ of habeas corpus, and ultimately decides that he must be surrendered for that second offence. Towards the end of the judgment (2) Mellish L.J. said: "The principal object of the section" (i.e., s. 6 of the Habeas Corpus Act, 1679) "seems to have been to prevent persons who had been brought up on a writ of habeas corpus, and discharged on giving bail and entering into their own recognizance, from being again arrested for

(1) L. R. 5 P. C. 179. (2) L. R. 5 P. C. at pp. 201, 202.

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the same offence, and obliged to sue out a second writ of habeas corpus. This appears from the provision by which the person discharged may be again arrested by the order of the Court, wherein he shall be bound by recognizance to appear, or other Court having jurisdiction of the cause. The words 'other Court having jurisdiction of the cause' were probably added to meet the case of an indictment having been moved by certiorari from one Court to another. They" (i.e., their Lordships) "do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shews no valid cause for his detention. They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first." A case within those words would be where on the merits with regard to the particular charge the first Court had decided that there was no evidence, and therefore discharged the prisoner. Undoubtedly in that case it was not intended that there should be a second attempt to charge the person with that offence, and the words which Mellish L.J. uses, "so that the return to the second writ of habeas corpus raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first," seem to me to shew that he is pointing to a decision upon the merits in respect of the matter upon which the person was sought to be arrested. Mellish L.J. continues: "In the present case the second warrant is a warrant by which Kwok-a-Sing was committed to take his trial at Hong Kong for piracy jure gentium and was, in their opinion, a valid warrant. They think he ought not to have been discharged from his custody under that valid warrant because he had been previously discharged from an unlawful imprisonment." Therefore we have to consider the ground upon which the applicant was sought to be detained and upon the ground that this Court has jurisdiction and power to deal with him notwithstanding the fact that he succeeded in showing that the proceedings on foilis was such that he could no longer be detained there. I am clearly of opinion that the

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objection taken that there has been a previous decision in India is no answer to these proceedings.

With regard to the Extradition Treaty with Germany of 1872, in my judgment the applicant has not been "tried," and therefore he cannot set up article IV. of the treaty as a bar to the extradition proceedings. On his behalf Mr. Danckwerts has upon that point very strenuously relied on articles IV. and XV. of the treaty, but it is only necessary to deal with article IV. I am unable to assent to the construction which Mr. Danckwerts contended ought to be given to article IV.—either in the English or German version—and I really cannot decide the question as to the accurate phraseology of the English translation, because that is a question which I am not competent to deal with. (1) But on the question as to the broad view which is to be applied, the English version of article IV. says in terms (and Mr. Danckwerts admits that it is against him in one sense) that the extradition shall not take place if the person claimed has already been "tried and discharged or punished, or is still under trial, in one of the States of the German Empire, or in the United Kingdom." In my judgment the applicant has not been "tried and discharged or punished." It seems to me that those words mean what they say, namely, that there shall be a trial and an acquittal or punishment. Mr. Danckwerts said that the German word "Untersuchung" means that there had been a preliminary inquiry. I do not think the article can be construed as meaning that a preliminary investigation as to whether there is sufficient evidence for extradition is a proceeding in which a person is "tried and discharged or punished." In my judgment it would defeat the whole object of the treaty if an untried criminal—i.e., untried in the strict sense of the word—could be allowed to be acquitted or discharged because there had been some prior discharge without the case having been dealt with finally.

The point as to the inadmissibility of certain evidence is not serious. If it had been necessary to rely upon Manteuffel's evidence it would have been necessary to consider how far

(1) [The words "ausser Verfolgung gesetzt" appear, in their natural meaning, to point to some kind of final determination.—F. P.]

hearsay evidence, or evidence of character, was admissible. In extradition cases matters constantly appear in the depositions which are not evidence according to our law; and if it had been necessary to rely upon matters of that nature in the present case the question might have arisen, but apart from them the evidence satisfies me that the prisoner played rouge et noir, and Manteuffel's evidence is not material.

As to the point upon which we have heard a very important argument with regard to there being no prima facie case, I accept and agree with the enunciation by Lord Russell of Killowen C.J. of the conditions of extradition in *In re Arton* (*No.* 2). (1) I agree that in order that the applicant can be extradited there must be evidence of the offence of obtaining money or goods by false pretences.

I am by no means clear with regard to the point as to the piece of paper being obtained from von Dippe. I do not wish to be thought to express an opinion that extradition could not be granted on the ground that what the applicant acting in concert with von Henrichs did was to obtain the piece of paper from the prosecutor von Dippe. But for reasons which I will advert to the point is immaterial. If there was a swindle (I do not wish to be thought to express any opinion on the point) the applicant was taking an active part in it.

Upon his behalf Mr. Danckwerts has strenuously contended that *Reg.* v. *Danger* (2) shews that there could be no indictment under s. 88 of the Larceny Act, 1861. For the moment I will assent to that; but I am not altogether satisfied with *Danger's Case*. (2) I think that the judgments in *Reg.* v. *Gordon* (3) shew that in that case *Reg.* v. *Danger* (2) did not receive entire approval, but it would be difficult for us to disregard *Reg.* v. *Danger* (2) if the facts in the present case brought it within the grounds of that decision. But in my judgment there is evidence upon which the applicant could be indicted for obtaining money or goods by false pretences. In *Danger's Case* (2) the Gaming Act, 1845, had no application. That statute was in force at the time the Treaty with Germany of 1872 and the Extradition

(1) [1896] 1 Q. B. 509. (2) 1 Dears. & B. C. C. 307.

(3) 23 Q. B. D. 354.

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Act, 1870, were respectively made and passed, and by s. 17 of the Act of 1845 it is enacted that "Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, ... or in bearing a part in the stakes . . . . win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." In my judgment the applicant could upon the evidence be indicted under that section for obtaining money by false pretences. I propose to deal with the substance of this matter. I agree with the contention of Mr. Danckwerts that the applicant did not win the piece of paper in the ordinary sense of the word "win." But the substance of the offence with which he is charged is that by cheating he obtained a right to claim 80,000 marks (4000*l.*) from von Dippe. What the depositions do is to disclose the way in which the offence was carried finally into effect. In my judgment the applicant could be indicted for winning the 80,000 marks from von Dippe if they came directly out of von Dippe's pocket and the applicant took possession of them, or if he had taken an I O U from von Dippe or anything which assisted him to obtain the money, and in the circumstances disclosed by the depositions he could be indicted for obtaining that money by false pretences. In my judgment it would be lamentable if we were compelled to hold—that being the real offence for which he was to be tried—that he must be allowed to escape trial because it might be said that he did not win the piece of paper at the time. The charge against the prisoner is that he obtained the money by false pretences within the meaning of the Gaming Act, 1845, the Extradition Act, 1870, and the Extradition Treaty with Germany of 1872, and in my judgment, as a person could be indicted for that offence at the time the treaty was made, on the words contained in the treaty, it is quite impossible to say that he is not charged with an extraditable offence. If it had been necessary to rely upon s. 90 of the Larceny Act, 1861, in order to formulate a charge against the applicant, I should have agreed with the

contention of Mr. Danckwerts upon his behalf. I should have held that an offence under that section is not extraditable and that in order to bring it within the treaty of 1872 there would require to be an amendment of the treaty. But although this point has required careful consideration in my judgment Mr. Danckwerts' argument fails because in 1872 a person who cheated at cards could be indicted for obtaining money by false pretences. I note that the German warrant is for obtaining a valuable security by false pretences, and I think the German words are right.

In my opinion, therefore, the rule should be discharged.

DARLING J. I am of the same opinion, and I think it only necessary to say a few words upon the last point dealt with by my Lord. I myself think that the decision at which we have arrived can be supported on the ground that the circumstances in which this piece of paper was handed to von Dippe are not in the least analogous to those in which the document was handed to the prosecutor in *Donger's case*, (1) It was handed to von Dippe in such circumstances that no action could be maintained to recover it back again from him if he had chosen to keep it. The present case is analogous to that where a person not having a cheque-book with him borrows a cheque from another person who happens to have an account at the same bank, and a cheque is handed over, and the piece of paper becomes the property of the person drawing the cheque.

But I think also that s. 17 of the Gaming Act, 1845, is applicable to this case. It is plain from the report of *Reg.* v. *Moss* (2) that in that case the prisoner was, to use the words of the Gaming Act, 1845, indicted for winning a "sum of money or valuable thing": and I think that in the present case the applicant could be properly indicted for winning this very piece of paper and might be convicted. In giving judgment in *Reg.* v. *Moss* (2) Pollock C.B. said: "Whether the word 'winning' is used in this statute in the limited sense in which 'winning' is used in the ruling decases, and means actually getting and obtaining the money, or

(1) 1 Dears. & B. C. C. 307. (2) (1856) 1 Dears. & B. C. C. 104.

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in its more general sense of obtaining a title to a sum of money by becoming the winner of a stake"—that is treating a stake as something imaginary—"no ambiguity can arise if the offence is stated as it is in this indictment in the very words of the statute; and it would create great difficulty in drawing indictments under this Act of Parliament if it were held necessary that it should be stated to whom the money which actually was won belonged." In the course of the argument he said: "This is not an indictment for obtaining money by false pretences, but is under a statute which says that if a person does certain things he shall be deemed to have obtained money by a false pretence." It seems to me that his judgment shews that in the present case the Gaming Act, 1845, would have been satisfied if an indictment had been drawn in the words of the statute and evidence had been given that the applicant cheated at cards and became entitled to a sum of money, it being admitted that he was entitled to that sum of money as a stake, but the stake not being forthcoming then a signed document was obtained by him. I think for the reason I have given in addition to those given by my Lord that this rule should be discharged.

PHILLIMORE J. I am of the same opinion, and as to the greater part of the case I have nothing to add to what my Lord and my brother have said. There are two matters only with respect to which I should like to add a few words.

The first is the point which arises under the Habeas Corpus Act, 1679. I think the true interpretation of s. 6 of that statute was given by Mellish L.J. in *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1), and some reference to history is necessary in order to arrive at that interpretation. The section was directed against reiterated commitments, as it says, for the same offence. Persons were committed; they were enlarged upon bail or their recognizances to appear. In those days it was frequently a very lengthy process to persuade the Court to go as far as that; and in addition there was the danger that a fresh warrant would be issued, and that the person again arrested upon it would be compelled to sue

(1) L. R. 5 P. C. 179.

out a second writ of habeas corpus, remaining in custody meanwhile; and it was intended by that section that so long as he had done nothing to forfeit his recognizance, or which justified the Court in calling upon his sureties to shew cause why their bail should not be estreated, he should not be recommitted upon the same charge, power being given to the Court before which the recognizance to appear was given to determine judicially, if it thought fit, that circumstances existed in which the person must be committed to prison, notwithstanding that at one time he was released upon bail, the like power being given also to any other Court having jurisdiction over the cause by reason of a transfer to it having taken place either, as Mellish L.J. suggested, by certiorari or otherwise.

I doubt if the section was intended to go any further, but Mellish L.J. suggests—and it may be so—that a case would come within the mischief of the statute if, with a colourable variation, the man was re-arrested substantially for the same cause. Mellish L.J. guards his sentence in this manner: "They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first." But though the second arrest is for the same cause, if the prisoner's discharge was because the warrant or the return to the writ of habeas corpus was bad, then it would be lawful to re-arrest for the same offence with a proper warrant, upon which a different return would be made. Therefore the fact that in the present case the applicant was discharged—not because he could not be committed for this crime, not because it was not an extraditable crime, nor for any such reason, but because a full inquiry had not been granted to him by the magistrate—cannot be a reason why he should not be re-arrested and the case fully investigated before his committal.

The other matter arises upon *Dauger's Case* (1), and I must say I appreciate and admire the learning and ability which discovered and applied *Dauger's Case* (1) to the present one. *Dauger's Case* (1) is one which requires a good deal of consideration.

(1) 1 Dears. & B. C. C. 307.

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It must be remembered that in that case the whole of the facts were reserved for the Court of Crown Cases Reserved. The Recorder set out the evidence and said: "At the close of the case for the prosecution, it was objected by the prisoner's counsel that there was no evidence that the prisoner had obtained from Richard Latham a valuable security within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 53, so as to sustain either count of the indictment, on the ground that the evidence shewed that the prisoner had obtained from Richard Latham either an acceptance only or an instrument which was not an available security or of any value to Richard Latham. I refused, on this objection, to direct an acquittal, but left the case to the jury, who found the prisoner guilty; but I reserved the question for the opinion of the Court of Criminal Appeal whether there was evidence that the prisoner obtained from Richard Latham a valuable security so as to sustain either count of the indictment." Then the grounds of objection, in arrest of judgment, are given. "After the verdict it was objected, in arrest of judgment, that each count of the indictment was bad for not alleging that the valuable security obtained by John Danger was the property of Richard Latham; and the case of *Regina* v. *Sill* (1) was cited. I also reserved that question; and I have to request the opinion of the Court of Criminal Appeal upon the above matters."

The Court of Crown Cases Reserved, drawing inferences of fact and law from the evidence before it, and having the salient and remarkable fact that the indictment did not allege that the piece of paper obtained by the prisoner had ever been the prosecutor's property, came to the conclusion that it never was the prosecutor's property, and, that being so, the Court held that s. 53 of 7 & 8 Geo. 4, c. 29, did not apply. It is enough here to say that in the present case there is evidence upon which the foreign tribunal may find that the bill of exchange was at one time the prosecutor's property—it is not necessary to go further than that—and the distinction between the facts relating to the piece of paper in the present case and those with regard to the piece of paper in *Danger's Case* (2) is great; or rather I should say there are several distinctions. In *Danger's Case* (2) the real mischief lay in inducing

(1) (1852) 1 Dears. C. C. 10. (2) 1 Dears. & B. C. C. 307.

the prosecutor to enter into the previous agreement to give money for leather which the prisoner alleged was in course of delivery to him. The piece of paper was obtained, made good, completed and passed in order to carry out that agreement into which the prosecutor was tricked. It was when it passed from the hands of the prisoner to the prosecutor already a piece of paper of considerable value. It had a bill stamp upon it and the drawer's name as the drawer. In these circumstances it might well be held by the Court,—that is all I need say—drawing inferences of fact, that there had been no gift to the prosecutor, and that the piece of paper never was the prosecutor's property: and, if that be so, it was never obtained from him. I agree that the Court also took the point that it was not a valuable security till it left the prosecutor's hands. Upon that I should like to express a plain opinion that they went too far; but the other ground of distinction is quite enough to support our judgment.

The facts in the present case are quite different from those in *Danger's Case.* (1) The piece of paper was a mere form, only valuable from the fact that it had a few words, making it a bill of exchange, printed or lithographed or written upon it. There is no reason why the German Court should not find that von Henrichs gave it to the prosecutor. If so, it was then his property, and he was induced to part with it by the false representations of the prisoner, the Gaming Act, 1845, having enacted that winning by cheating at play amounts to obtaining money by false pretences.

I do not think it is necessary to go further into the case, but I would add that upon the merits we are all clearly of opinion that there is, apart from the technical ground, ample prima facie evidence to justify the prisoner's committal for extradition.

Rule discharged.

Solicitor for applicant: *C. F. Appleton.*

Solicitor for respondent: *The Director of Public Prosecutions.*

(1) 1 Dears. & B. C. C. 307.

J. E. A.

C. A.

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July 16, 17, 19, 20, 24.

[IN THE COURT OF APPEAL.]

CANTIERE MECCANICO BRINDISINO *v.* JANSON.

Insurance (Marine)—Floating Dock — "Seaworthiness admitted" — Non-disclosure of Material Fact—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 17, 18.

The owners of a floating dock insured it against loss on a voyage by sea, the policy containing the words "seaworthiness admitted." The dock was in sound condition as a dock, but in order to make it seaworthy for a voyage it required special strengthening. It was not in fact so strengthened, the owners honestly believing that such strengthening was unnecessary, and that it was capable of being safely towed to its destination without it. The dock was lost on the voyage. In an action on the policy the underwriters contended that the fact that the dock had not been strengthened was a material circumstance the non-disclosure of which avoided the policy:—

Held, that as the underwriters knew that the subject-matter of the insurance was a floating dock and therefore not an ordinary seagoing vessel, they were by the insertion in the policy of the words "seaworthiness admitted" put on inquiry as to its construction, and in the absence of inquiry the owners were not bound to disclose the want of special strengthening.

Per Buckley L.J.: The question whether the dock required to be specially strengthened for the voyage was not a question of fact but of opinion, and in the circumstances the fact that the dock had not been strengthened was not a material circumstance which the owners were bound to disclose.

Judgment of Scrutton J. [1912] 2 K. B. 112, affirmed.

Appeal of the defendant from the judgment of Scrutton J. on the trial of the action without a jury.

The action was brought on certain policies of marine insurance on a floating dock in tow of two tugs from Avonmouth to Brindisi. The policies, which insured the dock against all the usual perils, contained the words "seaworthiness admitted." While being towed on the voyage to Brindisi the dock was totally lost in the Bay of Biscay. The defendant underwriters defended the action upon the grounds that they had been induced to subscribe the policies by reason of the concealment of a material fact, namely, that the dock was being sent on the voyage without the additional strengthening usual and necessary for the despatch of a dock on an ocean voyage; and that there had been misrepresentation,

namely, that the dock had been strengthened for the voyage. The following statement of the facts as to the defects of seaworthiness is taken from the judgment of Scrutton J.:—The dock in question was built of iron in the north by Messrs. Stephenson in 1893 for the use of the Bristol Corporation. It consisted of six pontoons side by side, one foot apart, but joined at the top only by riveted plating. Across the six pontoons on each side was erected a wall, partly open with diagonals, partly a hollow iron structure with a deck on top, the whole secured by angle irons and bolts to the pontoons. Its original cost was between 40,000*l.* and 50,000*l.* For some reason, probably because it was too large for the dock entrance at Avonmouth, it had not been erected in the north and towed round to Bristol as a whole, but the pontoons were towed round separately into the dock at Bristol, and there the whole structure was put together. It had consequently not been prepared for a sea voyage in the usual way. It remained, doing work for the Bristol Corporation, and well kept up by them till 1908, when their new dry dock was approaching completion. It was then found that work estimated at about 2800*l.* was necessary for its upkeep, and the Bristol Corporation determined to sell it as it was. A Mr. Constant of London bought it in 1911 for 5000*l.*, the low price being partly due to the fact that it had to be taken to pieces to get it out of the dock. He negotiated for its sale first to Argentina, then to Turkey. Ultimately on August 30 he sold it to the plaintiff firm for 12,000*l.*, which price included cost of towing from Avonmouth to Brindisi, cost of insurance, and all fittings, strengthening and towing gear, ropes, &c., necessary for the voyage. The contract of sale also provided that "Before the dock leaves vendors agree to hand purchasers Lloyds policies of insurance for 16,500*l.* This insurance will be duly indorsed over to them and they shall receive the full benefit of such policy." On July 11 Mr. Constant employed one Fletcher, a competent ship repairer, to get the floating dock out of the Avonmouth basin. Fletcher accordingly unbolted the pontoons and walls, took them out of the basin, and refitted them with some 20,000 new bolts. This undoubtedly made the dock a stronger structure than it was before. A general overhaul took place, and Mr. Constant spent over 2000*l.* on the

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reconstruction and overhaul, a substantial portion of which was occasioned by expenses caused by the sinking of one of the pontoons. No other preparation was made for the voyage, as Mr. Constant and Mr. Fletcher honestly thought that no preparation was necessary, the dock being in first-class condition and rebolted throughout. They were confirmed in this opinion by the report of Mr. Watkins, a surveyor who frequently acted in insurance matters, who reported on August 24 that the dock might safely be towed to a Mediterranean port provided that suitable arrangements for towing were made, and by the action of the tug owners, who, after inspection and provision of certain bollards, undertook to tow her to Brindisi on the terms that they should be paid nothing unless they delivered her there. After some delay she started in tow of two tugs from Avonmouth on September 13, and was lost in the northern part of the Bay of Biscay on September 16, the wind at that time being recorded at Ushant and the Longships Light as of force 5. The dock sank in two pieces, the wall and pontoons having parted amidships.

Upon the question of the concealment by the assured of a material fact the judge found the following facts. The dock was not at the time of sailing as fit for the voyage as was usual and proper for such an adventure or as she could have been made by ordinary available means. In other words it was not seaworthy according to the test indicated in the judgments in *Burges* v. *Wickham* (1) and *Turnbull* v. *Janson*. (2) In order to strengthen the dock for sea the pontoons should have been joined at the bottom, the diagonals should have been strengthened in their attachments, and the top deck of the side walls should have been strengthened. The strengthening would have cost between 4000*l*. and 5000*l*. Without it the dock was not strong enough to stand the probable strains of a sea way. The dock had not been strengthened for the voyage in the sense in which that term would ordinarily be understood. Her reconstruction with new bolts after taking her out of dock had strengthened her, but this was not done for the voyage and would not be ordinarily understood as strengthening for the voyage, though it was very relevant in considering her efficiency as a dock. The fact that

(1) (1863) 3 B. & S. 669, at p. 696. (2) (1877) 36 L. T. 635.

the dock had not been strengthened for the voyage was clearly material to the question whether and at what premium the underwriters should insure her. If they had been told it they would either have refused the risk or made further inquiries as to her construction. Neither Mr. Constant nor the plaintiffs nor any servant or agent of theirs whose duty it was to inform them knew or believed that the dock was not seaworthy in the sense above indicated. They all thought she was fit for the voyage. They knew that she had not at this time been specially strengthened for the voyage except in so far as the new bolts were strengthening, but honestly thought it unnecessary. They did not know that she had not, when built, been strengthened for a sea voyage round to Avonmouth, and had not in fact made such a voyage as a dock.

The facts relating to the alleged misrepresentation were that Constant arranged with a firm of Lotinga & Co. to manage for him the insurance of the dock. Lotinga & Co. instructed a firm of insurance brokers to effect the insurances. A Mr. Bullock, the brokers' representative, wrote to Lotinga & Co. asking for certain particulars as to the dock. Lotinga & Co. in reply sent to Bullock a note containing the words "Dock repaired; just been nearly rebuilt; pontoons taken apart and thoroughly repaired and strengthened to make the voyage." The issue of fact was as to whether either the writing itself, which was admittedly inaccurate in so far as it represented that the dock had been strengthened for the voyage, had been shown to the underwriters, or whether its contents had been orally communicated to them by Bullock. Some, but not all, of the underwriters had, however, seen Watkins' report before they initialled the slips.

Scrutton J. held with regard to the defence of concealment that the underwriters, who knew that the subject-matter of the insurance was a floating dock and therefore not an ordinary sea-going vessel, were by the insertion in the policies of the words "seaworthiness admitted" put upon inquiry as to its construction, and that the owners were not bound to disclose the fact that the dock had not been specially strengthened for the voyage. With regard to the defence of misrepresentation the learned judge found as a fact that the information contained in the

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written statement sent by Lotinga & Co. to Bullock had not been communicated to the underwriters, and that there had been no misrepresentation. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

Atkin, K.C., and *Holman Gregory*, K.C. (*R. A. Wright* with them), for the defendant.(1) The fact that the dock had not been specially strengthened for the voyage was a circumstance which, as Scrutton J. has found, would if known to the underwriters have affected the amount of the premium or their willingness to take the risk. It was therefore a material circumstance, which it was the duty of the plaintiffs to disclose to the underwriters: Marine Insurance Act, 1906, s. 18. It is no answer for the plaintiffs to say that they did not know that it was necessary that the dock should be strengthened, for s. 18 says that every material circumstance which is known to the assured must be disclosed, and in *Brownlie* v. *Campbell* (2) Lord Blackburn in discussing the obligation of the assured as to disclosure said: "The concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy"; see also *Bates* v. *Hewitt* (3), where Cockburn C.J. pointed out that it is immaterial from the point of view of the underwriter that the omission to communicate a material fact arises "from it not being present to the mind of the assured that the fact was one which it was material to make known." The non-disclosure of the fact that the dock had not been strengthened for the voyage is therefore a good answer to the plaintiffs' claim unless the circumstance not disclosed was one as to which information was waived by the underwriters (s. 18, sub-s. 3 (*c*)), or the circumstance is one which it was superfluous to disclose by reason of an express or implied warranty (s. 18, sub-s. 3 (*d*)). The acceptance of the risk "seaworthiness admitted" did not amount to a waiver, nor did it render the disclosure superfluous. The object

(1) The arguments on the question of misrepresentation turned entirely on the facts and have, therefore, been omitted from this report.

(2) (1880) 5 App. Cas. 925, at p. 954.

(3) (1867) L. R. 2 Q. B. 595, at p. 607.

of inserting those words in a policy is to get rid of the implied warranty of seaworthiness and thus to avoid the necessity of causing both parties to the insurance to incur unnecessary expense in obtaining information, but the admission of seaworthiness has not the effect of freeing the assured from his obligations as to disclosure of every material circumstance. The underwriters by admitting seaworthiness agree not to raise unseaworthiness as a defence to an action on the policy: *Forrest* v. *Thompson* (1); but if the assured knows of some circumstance which affects the vessel's seaworthiness and does not disclose it, the non-disclosure avoids the policy, notwithstanding that the policy contains the words "seaworthiness admitted."

Bailhache, K.C., and *F. D. Mackinnon*, for the plaintiffs. In considering the extent of the duty of the assured to disclose every material circumstance it is essential to bear in mind the subject-matter of the insurance. In this case it was not an ordinary seagoing vessel, but it was, as the underwriters knew, a second-hand dock, a structure which had not been built for the purpose of making voyages but which was capable of floating and being towed. Whether any and what measures were necessary in order to render the dock seaworthy was a difficult question, of opinion rather than fact, and one as to which, as the evidence shewed, different persons might hold different views. In order to avoid all difficulty, the insurance was put forward and accepted by the underwriters on the basis of seaworthiness admitted. The underwriters thereby waived the disclosure of any fact bearing on the question of the seaworthiness of the dock. If the plaintiffs were bound to disclose the fact that the dock had not been strengthened for the voyage they would have been equally bound to disclose every circumstance in any way bearing on the question whether the dock was in fact seaworthy, whether they knew the materiality of the circumstance or not, and one of the chief objects of inserting the words "seaworthiness admitted" in the policies would have been defeated. The underwriters know that the subject-matter of the insurance was a dock which can never be seaworthy in the ordinary sense of the word, and they were thus put upon inquiry, and if in their opinion any particular precautions were necessary

(1) (1844) 13 M. & W. 392.

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in order to render the structure seaworthy they should have asked whether those precautions had been adopted. It is conceded that the contract being one of marine insurance is one based upon the utmost good faith, and if the plaintiffs had known of the existence of any particular defect which rendered the dock unseaworthy they were bound to disclose it, but they were not bound to disclose the fact that the dock had not been strengthened if they honestly believed, as they did, that it could safely perform the voyage without being strengthened.

Atkin, K.C., in reply, referred to *Burges* v. *Wickham* (1) and *Turnbull* v. *Janson*. (2)

Cur. adv. vult.

July 24. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an action on a policy of marine insurance upon a floating dock in tow of two tugs from Avonmouth to Brindisi. That policy insured the dock against all usual perils. The claim was for total loss. By the policy the seaworthiness of the dock was admitted. The underwriters respectively plead that they are not bound, by reason of the concealment of a material fact, namely, that the dock was being sent on the voyage without the additional strengthening usual and necessary for the despatch of a dock on an ocean voyage; and further, or in the alternative, plead that "the defendants were severally induced to subscribe the respective policies by a material misstatement of fact made to them orally at the respective times when as appears from the slips to which the defendants will refer they severally initialled such slips by Samuel Walker Bullock, of Tozer, Hemsley & Fisher, the broker through whom the insurance was effected, namely, the statement that the dock had been nearly rebuilt and thoroughly repaired and strengthened to make the voyage. In fact the dock had not been nearly rebuilt or thoroughly or at all repaired or strengthened to make the voyage."

The defendants delivered particulars of the additional strengthening rendered necessary by the fact that the stresses to which a floating dock is exposed while being towed on an ocean voyage are different from the stresses involved in the operation of

(1) 3 B. & S. 669. (2) 36 L. T. 635.

lifting vessels for which it is constructed. "Such strengthening is needed to bind together the pontoons of the dock so as to give longitudinal strength to the dock. It is effected as a general rule by giving greater strength to the side walls of the dock by adding increased thickness to the plating of the lower deck connecting the side walls and also to the steel plating of the lower deck connecting the pontoons with plates or angles or otherwise."

Such strengthening was said to be necessary in the case of the dock referred to in the points of claim by reason "(1.) that the dock was built of iron: (2.) it had never been adapted for towage in the open sea; (3.) it had been almost completely disused and unattended to since 1908: (4.) the plates connecting the pontoons were only $\frac{7}{16}$ inch thick; (5.) the side walls were in no place more than 29 feet high; (6.) the side walls were not of uniform height; (7.) the diagonalisation in the way of the bow portions was not strong enough for the force which would come upon it; (8.) the bridges connecting the side walls were weakened by hatchways cut on either side of each of the central towers. No such strengthening was effected or intended to be effected in the said dock of the kind above set out, nor any strengthening in substitution therefor, but the dock was sent to sea without the same. The defendants will rely on the circumstance that none of the above material facts were disclosed to them at the respective dates which appear on the slips as the dates when the defendants severally initialled the same, such being the non-disclosure or concealment alleged in the said paragraph of the points of defence."

Scrutton J. deals first with the defence of concealment or, as I think it is more accurately called, having regard to the duty of the assured, non-disclosure, and leaves misrepresentation till the latter part of his judgment.

I will deal first with misrepresentation. As to misrepresentation, it is not necessary that the misstatement charged should be fraudulent. It is sufficient to justify an avoidance by the insurer of the contract of insurance if during the negotiations for the contract there is an untrue material representation made by the assured or his agent to the insurer. This appears by s. 20, subs. 1, of the Marine Insurance Act, 1906. See 20 further

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provides that "(2.) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. (3.) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief. (4.) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer. (5.) A representation as to a matter of expectation or belief is true if it be made in good faith. (6.) A representation may be withdrawn or corrected before the contract is concluded. (7.) Whether a particular representation be material or not is, in each case, a question of fact." Then s. 21 provides: "A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped."

Scrutton J. points out, when dealing with this part of the case, that it is sufficient to avoid the contract if the statement was in fact made, and it was untrue, and that it is not necessary that the underwriter should have relied on it, and the learned judge in my opinion had present to his mind all the provisions of s. 20. He comes to the conclusion that the representation, if made, that the dock had been strengthened to make the voyage was untrue, in the sense in which any underwriter would understand it was untrue, but comes to the conclusion that the misrepresentation was not in fact made, or at all events was not proved to have been made, by the assured or his agent to the underwriters. If this finding stands, the defence of misrepresentation fails. The Court of Appeal may of course review the finding. In the case of a finding in fact by a judge sitting without a jury the Court of Appeal may reverse the finding, although the finding in fact is not perverse, and it is the duty of the Court to do so, if satisfied that the finding in fact is wrong, but the Court of Appeal should in my opinion in every case bear in mind that the judge saw and heard the witnesses, and should not easily

reverse his findings in fact. I think this of great importance in the present case, in which Scrutton J. obviously did not believe some of the evidence. I am of opinion that we should not in the present case disturb the finding of the learned judge that the misrepresentations alleged were not proved.

The defence of non-disclosure is not easy to deal with. Scrutton J. says as to this in his judgment: "I will deal first with the defence of concealment of the material fact that the dock was being sent on a voyage without the necessary extra strengthening for such a voyage," and says, "As this defence on a policy 'seaworthiness admitted' appears to me to raise somewhat novel questions, I proceed to state fully my findings in fact."

Summarized these findings are: 1. Dock not seaworthy at commencement of voyage. 2. Dock not strengthened for the voyage. 3. This non-strengthening material to question whether and at what premium they should insure. 4. That neither Mr. Constant (the vendor of the dock to plaintiffs) nor the plaintiffs nor any agent of theirs whose duty it was to inform them knew or believed that the dock was not seaworthy. They all thought she was fit for the voyage, but they knew that the dock had not at this time been specially strengthened for the voyage, but honestly thought it unnecessary. They did not know that she had not when built been strengthened for a sea voyage round to Avonmouth and had not in fact made such a voyage as a dock.

Having found these facts, Scrutton J. puts the question to himself, "What is the extent of disclosure necessary by an assured who asks an underwriter to insure 'seaworthiness admitted' a subject matter such as a river steamer or dressing dock, which can never be seaworthy in the ordinary sense of the term, for it is not intended for sea work, but which can have additional temporary strengthening for a voyage built into it or added to it? There can be no doubt that if the assured knows of any specific defect, such as a leak or badly corroded plates, he must disclose it in asking for an insurance 'seaworthiness admitted.' So also if the assured knows or believes that the dock is not fit to go to sea owing to the absence of some strengthening usually added, or has a report or opinion to that effect, though he thinks it

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erroneous, he must, in my opinion, disclose his knowledge or his unfavourable report. But suppose none of these facts exist, but the assured and his servants honestly believe the dock is strong enough to go to sea, and tell the underwriter she is a 'floating dock' (in this case one of some age), must they disclose anything else? If the policy did not admit seaworthiness they need not disclose anything, for the implied warranty excludes the necessity of disclosure of facts which would break it." He then refers to the Marine Insurance Act, s. 18, sub-s. 3 (*d*), which says that "In the absence of inquiry the following circumstances need not be disclosed, namely:—(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty." Scrutton J. continues: "But if the warranty is excluded by the words 'seaworthiness admitted,' must they give the underwriter without his asking for it a full statement of the construction of the structure which they have informed him is a floating dock; or when they tell the underwriter it is a floating dock and therefore not an ordinary seagoing vessel, and ask him to admit its seaworthiness, do they put him on inquiry as to its construction and the means adopted to send it to sea, with the result that if he does not ask he waives information?" Scrutton J. then quotes the cases of *Carter* v. *Boehm* (1) and *Seaton* v. *Burnand* (2) as instances where the subject-matter of insurance was sufficient to put the underwriter on inquiry and relieve the assured from disclosure till asked. *Carter* v. *Boehm* (3) seems the more appropriate authority because in that case it was the character of the ship which put the underwriter on inquiry, whereas in *Seaton* v. *Burnand* (2) the subject-matter of the insurance was a loan and surety. Scrutton J. proceeds: "The clause 'seaworthiness admitted' is put into these insurances of floating docks and river steamers not ordinarily engaged in sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service; and in my view the proposal of such an insurance to an underwriter, while requiring the disclosures I have already

(1) (1766) 3 Burr. 1905, at pp. 1910, 1911.

(2) [1900] A. C. 135.

(3) 3 Burr. 1905.

suggested, puts him on inquiry as to the actual construction and strengthening if any, of the subject-matter if he wants to investigate it."

I think this reasoning of Scrutton J. substantially sound. He does not exclude all obligation to disclose. He recognizes this obligation in the instance he cites in the passage I have quoted. I think that in a case like the present of the insurance of a floating dock not fitted in its original construction to go a voyage on the ocean and insured under a "seaworthiness admitted" policy, the contract between the underwriter and the assured is something of this sort: "We will raise no defence that the dock was not seaworthy, from the very fact that this floating dock of this class of construction could not be expected to be seaworthy in the ordinary sense of the word; but nevertheless if this dock has a peculiar defect not usual in docks of this construction which creates an extraordinary risk, this you must disclose; otherwise the policy may be avoided by the underwriter." The avoidance of the policy in such a case would seem rather to be based on want of good faith in accordance with s. 17 of the Act of 1906 than on s. 18, which to a large extent seems excluded by the "seaworthiness admitted" form of policy. The non-disclosure alleged is in my judgment non-disclosure of matters as to which the underwriters were put on inquiry by the character of the dock, which was not built for voyages on the sea, and by the invitation given by those who wished to insure the dock to the underwriters to issue a "seaworthiness admitted" policy.

I think this appeal must be dismissed.

FLETCHER MOULTON L.J. I do not propose to recapitulate the facts of this case, which are very fully and accurately stated in the judgment of the learned judge in the Court below and in the judgment which has just been read. I will come at once to the points at issue in the case. The first point raised on behalf of the appellants, the defendants, is that they are entitled to succeed because there was an actual misrepresentation to the underwriters. This question turns entirely on the slip which had been given by Messrs. Lofting, who were acting for the plaintiffs,

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to Mr. Bullock, the insurance broker acting on behalf of the plaintiffs, and the communication of what was on that slip to the underwriters, whom he induced to insure the risk. According to the evidence Mr. Bullock wrote on August 16, 1911, to Messrs. Lotinga asking for particulars of the dock which he was about to insure, and enclosed in his letter a pencil memorandum of the points upon which he required information. That pencil memorandum was filled up in ink by Messrs. Lotinga, and sent by them on the same day to Mr. Bullock. It is common ground that it was filled up most inaccurately. The name of the makers was wrong, the date was wrong, the description of the construction was wrong; and there was a statement as to what had been done with the dock which, the defendants say, was wrong in most material points. No point is made as to the small errors, but the underwriters do rely upon that which relates to what had been done to the dock, which was stated as follows: "Dock repaired; just been nearly rebuilt; pontoons taken apart and thoroughly repaired and strengthened to make the voyage." It is asserted that this was communicated to the underwriters, and that it informed them that the dock had been strengthened for the voyage, whereas in fact no strengthening had been done. It is not seriously contested that if a representation in that form had been made to the underwriters it would have been a misrepresentation. Speaking for myself, and having looked at the original slip, I am of opinion that the statement with regard to "strengthening" related to the individual pontoons, and the phrase "just been nearly rebuilt" appears to me to refer to the whole dock. After that there is a space, and a new sentence begins with the words "pontoons taken apart and thoroughly strengthened to make the voyage." So that if the information given to the underwriters had been precisely and exactly as it was given in the slip, I am not sure that it would have been a representation that the dock as a whole had been strengthened, and I think that there was no misrepresentation and certainly no bad faith in saying that the pontoons, the individual parts of the dock, had been strengthened, because they had been taken apart, and 20,000 old bolts had been replaced by new ones. But it is quite clear to my mind on the evidence that the slip was

shewn to no one of the underwriters: and the whole question therefore is, was the information which it gave to Mr. Bullock communicated by him orally to the underwriters who took the risk? We are of course entitled in this Court to review the decision of a judge of first instance on a question of fact; but I feel bound to say that this part of Scrutton J.'s judgment seems to me to shew not only that he properly weighed the evidence, but that he was fully aware of what was his proper task, and applied himself to it with very great skill and impartiality, and I have come to the conclusion that the grounds which Scrutton J. gives for thinking that it was not proved that Mr. Bullock gave the information contained in the slip to the underwriters are fully sustained by the evidence. I agree with him that as regards those underwriters, from Mr. Poole onwards, who saw the full report of Mr. Watkins, the ship surveyor, this question is unimportant, because it plainly appears from that report that no strengthening had been, or was intended to be, done to the dock, so that any information given to them by Mr. Bullock one way or the other would have had no effect upon them. With regard to those underwriters who came before Mr. Poole, and who had not seen Mr. Watkins' report, I agree with the learned judge that the evidence does not shew that the contents of the slip had been communicated to them. Mr. Bullock's own evidence on the point seems to have been given argendo. He had the slip, and therefore he supposed that he communicated the contents to the underwriters. I do not think that Mr. Bullock had any memory on the subject, and the evidence of the underwriters themselves makes it so doubtful whether a misrepresentation was in fact made that the judge was bound to come to the conclusion that the allegation of misrepresentation had not been made out.

A much more difficult question arises with regard to the alleged concealment of a material fact. I say that it is difficult, not because I feel any doubt about it, but because it is difficult to lay down in general terms the law in regard to such a question as arises under the head of concealment in this case. To understand it properly one must consider the nature of the transaction. Here was a dock which had been used as a dry dock for eighteen years at Avonmouth. It was formed of six floating pontoons

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joined together by a continuous deck, and upon them on each side was erected a wall, as it has been called. Each wall really was a very big longitudinal girder 360 feet long on each side, rising to a height of 29 feet above the deck. The result of such a structure would be to produce two longitudinal girders of great strength. They had to be of great strength because it was intended to dry-dock ships of different lengths, so that in some cases there would be considerable transverse stresses upon each of the girders, and considerable bending stresses over these side walls. When the dock was bought it had to be taken to pieces in order to get it out of the port where it had been at work, the pontoons and the girders having to be dealt with separately. The man who did this work was called, and it is clear that the dock was treated with all care, that some 20,000 new bolts were put in, and that the dock was found in splendid condition. It was proposed to tow that structure to Brindisi, and that was the risk against which the owners wished to insure. Very properly Mr. Bullock applied for an insurance, "seaworthiness admitted." In my opinion that phrase "seaworthiness admitted" signifies that no defence is to be raised by the insurers on the ground that the structure was not fit to contend against the perils of the sea. It is very difficult indeed to give any definition of seaworthiness as applied to a structure like this, which is not properly a vessel at all, though it might be called one in a legal sense. But nobody supposes that a structure of this kind could sustain the perils of the sea which a ship ought to be able to sustain; and I should think that nobody imagines that such a vessel on being sent to sea is safe and seaworthy in the same sense as a tramp steamer or an Atlantic liner. To my mind the words "seaworthiness admitted" gave the insurers notice of the peculiarity of the risk, and put them on examination as to whether with regard to this strange structure, which was to be towed over the sea, they were willing to take the risk. That it was recognized that it was not seaworthy in the ordinary sense is clear to me from the amount of the premium. A premium of 5*l.* per cent. for a Mediterranean voyage shews quite clearly that both parties realized that it was not an ordinary risk.

I wish not to be misunderstood. I have no doubt whatever that if you apply for a policy of insurance "seaworthiness admitted" you must measure your duty as a person applying for an insurance by the nature of the policy that you ask for, and that if seaworthiness is admitted the duty of disclosure covers all those things which in such a policy would affect the premium or the willingness of the underwriters to accept the risk. I take it that this represents the effect of ss. 17 and 18 of the Marine Insurance Act, which, in my opinion, apply to policies of every kind, whatever risk be insured against. They apply to every policy by reason of the nature of the contract of insurance. Whether or not any particular act comes within the duty of the person seeking to insure depends upon the policy that is about to be taken out; and, therefore, I agree with the view put forward in argument that if there was anything known to the owners or their agents which would tend to affect the premium or the willingness of the underwriters to take the risk, in a case where seaworthiness is admitted, they were bound to disclose it. Sect. 17 lays down that a contract of marine insurance is one of the utmost good faith. Sect. 18 says that the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him. Then sub-s. 2 of s. 18 says that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. If there were something known to the owner within the meaning of those sections which would affect the willingness to take the risk or the premiums, the obligation rested on the owner to disclose it, and we must measure the extent of that obligation by remembering that this policy was one on which there was to be no defence raised on unseaworthiness.

Now, what does that duty of disclosure cover? I have not the slightest doubt that if, for example, there had been corrosion to the plates of the dock so that their strength was diminished, the assured would have been under an obligation to disclose that fact, and if it had not been disclosed, the person taking the

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risk could have avoided the policy. But nothing of that kind is alleged in this case. All that is alleged is that the assured did not disclose that the dock had not been strengthened. With regard to those of the underwriters who saw Mr. Watkins' report, the case breaks down on the question of fact, because that report was clear notice to them, not only that the dock had not been strengthened, but that there was no intention to strengthen it, and that the dock was to be taken, just as it was, to Brindisi, which was the risk to be underwritten. But there was a certain number of underwriters who did not see that report, and it is therefore necessary to consider how the case stands with regard to them.

The true position with regard to a dock of this kind is this: Docks are made of various strength; if you think that a dock is not strong enough for a sea voyage, and you want it stronger, you strengthen it; if you think it is strong enough, you let it alone. To talk about there being a universal knowledge that these docks have all to be strengthened is to go far beyond the evidence. In my opinion, according to the evidence, it is clear that docks may be built so that they may be sent on a sea voyage just as they are. Therefore, to say that, when you ask a firm to insure a dock, you implicitly represent that it has been strengthened is wholly incorrect. What the underwriters were asked to do was to insure a dock, and there was no representation that it was strengthened, nor is there any custom generally known to underwriters of strengthening docks before they go to sea anything like so universal or necessary in all cases as to make an application to insure a dock mean a "strengthened dock." Evidence was given by the representatives of two excellent firms who had spent their lives in dealing with these docks. But I cannot find a trace of the existence throughout the shipping world of a custom of using the particular devices of those two excellent engineering firms with regard to securing the safety of docks or of recognizing their methods as things which ought to be, and which ordinarily are, adopted. Suppose these two witnesses had said that in cases where such structures are going abroad they always put a strengthening fin down the centre of the pontoons. Could it be said that a policy of insurance

on a dock in which no representation was made except that the insurance was to be on that particular dock was invalidated because the owner who had never heard of the private practice of these people to strengthen docks in that way did not tell the underwriters that there was not a strengthening rib down the centre of the pontoons? The duty put upon the owners cannot be affected by negligence on their part, but I have no hesitation in coming to the conclusion that there was in this case no representation of anything except that this was a dock in its normal state; that there was no duty on the part of the owner to know of the practice of these two excellent firms; and that in not referring to the fact that this private practice had not been carried out the owner of the dock was not failing in any duty whatever which he owed to the underwriters. I think I ought to go further. In my opinion there was no evidence that the insurers themselves knew anything of this private practice. They were put on notice that this was an insecure structure by reason of it being a dock; and they were demanding a high premium for the risk of insurance of such a structure against the perils of the sea. In these circumstances it was for them to make any inquiries as to the condition in which the dock was going to be sent to sea, and in my opinion there was no failure of duty on the part of the assured. I think, therefore, that the appeal should be dismissed.

BUCKLEY L.J. read the following judgment:—This is an action upon a policy of marine insurance of a dry dock "seaworthiness admitted." She was lost at sea. She had not been strengthened for the voyage. The defences are two: First, misrepresentation, namely, that the assured stated that she had been strengthened for the voyage. Secondly and in the alternative: non-disclosure of a material circumstance, namely, that she had not been strengthened for the voyage. As to the former the defendants have not proved the misrepresentation which they allege. I agree with all that Scrutton J. has said as to the evidence on this point. I cannot improve upon it. I will add that in my opinion counsel who was cross-examining Hallock if he was going to rely upon his answer at p. 10 as evidence of misrepresentation

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was bound to obtain an amplification of his general statement by asking him as to details. His general answer is only in substance "Certainly as an honest man I disclosed all the information I possessed." Counsel ought to have asked what disclosure he made: for instance what he said, whether he said anything and what as to strengthening. It may for instance well have been that he said that the dock had been strengthened (as she had), not that she had been strengthened for the voyage (as she had not). But upon the evidence it is not I think proved that he said anything about strengthening at all.

As to non-disclosure. This defence will succeed if it be shewn either (1.) that there was fraud (which is not alleged) or (2.) that the duty of disclosure which lay upon the assured in inviting a contract in which uberrima fides must be shewn has not been discharged. The conditions of this contract include "seaworthiness admitted." The result is not the same as if such admission were contained in a pleading. The result is not that seaworthiness can never be in issue. The result may be stated in either one of two ways, either (1.) that the shipowner's warranty of seaworthiness is to be taken as fulfilled, or (2.) that the risk of unseaworthiness is one which the underwriter accepts, with the result that if the vessel is lost by unseaworthiness the underwriter is liable: *Parfitt* v. *Thompson*. (1) But in either case it remains that the duty of disclosure (now found by way of codification in the statute) must be discharged. If the shipowner knows any material circumstance within the meaning of the Act of Parliament he must disclose it in obtaining the assent of the underwriter to the contract, and none the less because it contains as it does the condition "seaworthiness admitted": *Brownlie* v. *Campbell*. (2)

I will endeavour to state the disclosure which the assured was bound to make and to see whether he has made it. Before the contract was concluded he owed the duty of disclosing every material circumstance which he knew and every material circumstance which in the ordinary course of business he ought to have known. This duty extended to every such circumstance as was material and was not confined to such as he knew or

(1) 13 M. & W. 392. (2) 5 App. Cas. at p. 954.

thought to be material. Whatever was the character of the vessel which he desired to insure he was bound to disclose any specific defect which he knew or in the ordinary course of business ought to have known. But by material circumstance is I think meant a material circumstance of fact to the exclusion of a material circumstance of opinion. Whether the dry dock here tendered for insurance required to be strengthened for the voyage or not was I think question of opinion. The assured honestly believed and had the authority of Watkins' report for believing that she did not require to be strengthened for the voyage, but might safely be towed to a Mediterranean port provided that suitable arrangements for towing were made. The assured was bound to disclose that report as soon as he had it. He did so. If he had received any other report, say to a contrary effect, the existence of the opinion which it contained was matter of fact and its disclosure was necessary as being a material circumstance. But whether she required to be strengthened for the voyage or not was not question of fact but question of opinion. Further the assured need not disclose (s. 18, sub-s. 3 (*b*)) any circumstance known or presumed to be known to the insurer, and the insurer is presumed to know matters which an insurer in the ordinary course of his business as such ought to know. The insurer in my judgment must be presumed to know that a dry dock is not an ocean-going craft and unless she has been built with a view to or has been strengthened for a voyage is not seaworthy. The effect of the words "seaworthiness admitted" is I think for the purposes of s. 18, sub-s. 3 (*b*), that the underwriter says "I know that the subject tendered for insurance is a dry dock; I know that such a craft is not seaworthy unless she has been strengthened. I admit that this craft satisfies such a standard of seaworthiness as is to be reasonably expected in a craft of this kind and as between you and me I will not raise the question that she is not seaworthy." The underwriter accepts the contract on the footing of that admission and is bound unless the assured has withheld some specific defect or some specific knowledge or report as to some matter such as I have mentioned. I may express the same thing in other words as follows: A defect known to the insurer need not be disclosed

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(s. 18, sub-s. 3 (*b*)): a defect whose existence or non-existence is matter of opinion need not be disclosed at any rate to an insurer who admits that for the purposes of the contract the answer may be taken to be a particular answer which the assured believes to be the true answer. Scrutton J. says: "The clause 'seaworthiness admitted' is put into these insurances of floating docks and river steamers not ordinarily engaged in sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service; and in my view the proposal of such an insurance to an underwriter, while requiring the disclosures I have already suggested, puts him on inquiry as to the actual construction, and strengthening if any, of the subject-matter if he wants to investigate it." I entirely agree with the view thus expressed.

Further the insurer need not disclose (s. 18, sub-s. 3 (*c*)) any circumstance as to which information is waived by the insurer. The question of fact was not whether the craft ought to have been (which was matter of opinion) but whether she had been (which was matter of fact) strengthened for the voyage. By the words "seaworthiness admitted" the underwriter in my opinion waived any information as to what had been done. He was content to take the risk upon the conditions expressed or implied by the words that the subject of insurance was a dry dock whose seaworthiness for the purpose of the voyage he was to accept without further information. It has been found as a fact (1.) that the craft was not seaworthy without strengthening for the voyage, (2.) that she had not been strengthened for the voyage, (3.) that the fact that she had not been so strengthened was material, and (4.) that the assured honestly thought that she was seaworthy without further strengthening. The first question material to the underwriter was whether she wanted strengthening. This was question of opinion and is not in my opinion within the Act. If and only if this question was answered in one way did the fact become material that she had not been strengthened. The fallacy of the appellants' argument seems to me to lie in this, that at every turn they start with the assumption that the craft being a dry dock necessarily required

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strengthening. In my judgment this is not true. Had she been built for a foreign purchaser she would have been built with sufficient strengthening for a sea voyage. She had not been so built and did in fact require strengthening, but as matter of opinion the assured honestly thought that she did not. The terms upon which the underwriter accepted the risk I think were that upon this question of opinion he was prepared to admit that strengthening was not necessary. Under those circumstances the fact that she had not been strengthened was not a material circumstance. The underwriter cannot say "I agree that I admitted that this vessel (as you believed) did not require strengthening for the voyage, but nevertheless it was material that she had not been strengthened." I am of opinion that Scrutton J.'s judgment is right. He rests it upon waiver and upon disclosure which put the underwriter upon inquiry. As to the former I agree. As to the latter I prefer to express it as I have done in the form that a question of opinion is not a material circumstance within the Act and that there was no material circumstance of fact known or which ought to have been known to the assured which he failed to disclose. In my judgment the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendant: *Parker, Garrett & Co.*

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April 18, 19, 22.

[IN THE COURT OF APPEAL.]

GLEGG *v.* BROMLEY.

GLEGG AND ANOTHER, CLAIMANTS.

Fraudulent Conveyance—Valuable Consideration—Antecedent Debt—13 *Eliz. c.* 5, *s.* 6—*Garnishee Proceedings.*

Mrs. G. was plaintiff in an action against H. for false representation, and was also plaintiff in the present action against the defendant for slander. Mrs. G., being at the time largely indebted to her husband, on May 21, 1910, executed in his favour a deed of assignment, whereby, after reciting that he had requested her to give him further security which she had agreed to do, she assigned to him "all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the said action or otherwise howsoever, under or by reason of the same, to hold the same . . . . subject to redemption on payment of all moneys due to him." Subsequently the action brought by Mrs. G. against H. was dismissed, with costs amounting to 218*l.*, but the action brought by Mrs. G. against the defendant resulted in a verdict for the plaintiff for 200*l.* with costs. H. thereupon instituted garnishee proceedings against the defendant to attach the amount of damages recovered by Mrs. G. in satisfaction of the costs due to him in the first action, and in these proceedings Mrs. G.'s husband also claimed to be entitled to those damages under the assignment from his wife to him:—

Held, first, that the assignment was made for good consideration, and, secondly, that the assignment was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property, that is, of the fruits of an action as and when recovered, and that it was consequently not void under 13 Eliz. c. 5.

Decision of Divisional Court reversed.

APPEAL by Captain Glegg, the claimant, from a decision of a Divisional Court (Lord Coleridge and Hamilton JJ.).

The facts were shortly as follows:—

In May, 1909, Mrs. Glegg, the plaintiff in the present action commenced an action against Mr. Hay, one of the present claimants, for damages for false representation; and in October of the same year she commenced the present action against Lady Bromley for slander. At that time the plaintiff was indebted to her husband to the extent of about 7000*l.* on the security of mortgages of her property, and she owed large sums

to other creditors. On May 21, 1910, by an indenture made between the plaintiff and her husband, Captain Edward Maxwell Glegg, reciting that her indebtedness to him could not then be precisely ascertained, and that he had requested her to give him further security for the sums owing to him and that she had agreed to do so, it was witnessed that in pursuance of the agreement and in consideration of the sums so owing to him she assigned to him "all that the interest sum of money or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley* or under or by virtue of any verdict compromise or agreement which she may obtain or to which she may become party in or consequent upon the said action or otherwise howsoever under or by reason of the same To hold the same . . . . subject to redemption on payment of all moneys due to him." On June 6, 1910, the action of *Glegg* v. *Hay* came on for trial, and, the plaintiff not appearing, judgment was entered for the defendant Hay, the defendant's costs being subsequently taxed at 218*l*. Towards the end of June Mrs. Glegg, who had no money of her own wherewith to prosecute her action against Lady Bromley, drew with her husband's authority cheques upon her husband's banking account to the amount of 140*l*. for the purpose of paying her counsel's fees. On July 7, 1910, the action of *Glegg* v. *Bromley* was heard, and the verdict passed for the plaintiff with damages 200*l*. Mr. Hay thereupon obtained a garnishee order to attach those damages in respect of the debt due to him for his costs. His claim was met by the assignment of the damages to Captain Glegg under the deed of May 21, 1910. An interpleader issue was directed to try the validity of the assignment, and the Master before whom it was tried upheld the assignment and gave judgment for Captain Glegg. He found as a fact that the assignment was executed deliberately with the object of defeating Mr. Hay's claim, but that as Mrs. Glegg owed money to her husband it was for value, and that the intention to prefer one creditor to another did not prevent it from being bona fide within the meaning of 13 Eliz. c. 5. From that decision Mr. Hay appealed. The Divisional Court (Lord Coleridge and Hamilton JJ.) allowed the appeal, holding that

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an antecedent debt is not of itself a valuable consideration under s. 6 of 13 Eliz. c. 5 for a security given by the debtor, and, further, that the rule that in garnishee proceedings the judgment creditor in general takes only such rights as the judgment debtor had does not preclude the judgment creditor from impeaching an assignment by the judgment debtor to a third person as being in fraud of creditors and void under the 13 Eliz. c. 5; and that this holds good even where, the assignment having been an assignment of future property, the judgment creditor had not recovered judgment at the date of the assignment, provided he recovered it before the future property fell into possession and the assignment attached. From that decision the plaintiff now appealed.

Shearman, K.C., and *Cababé*, for the appellant. Even if this assignment could have been attacked under the statute of Elizabeth as being in fraud of creditors, the objection is not one that can be taken in garnishee proceedings. The judgment creditor cannot in such proceedings stand in a better position than the judgment debtor, and if the judgment debtor could not enforce a claim against the garnishee, neither can the judgment creditor: *Vyse* v. *Brown* (1); *Cole* v. *Eley* (2); *Hirsch* v. *Coates* (3); *In re General Horticultural Co.* (4); and here as between the wife and her husband the assignment could not have been set aside. But the deed is good under the statute of Elizabeth. Under that statute there is nothing to prevent a debtor from preferring one creditor to another, and if the transaction whereby he gives a security to the favoured creditor is not a mere cloak to retain a benefit for himself the antecedent debt is a sufficient consideration to support it: *Holbird* v. *Anderson* (5); *Middleton* v. *Pollock* (6); *Alton* v. *Harrison*. (7) It is only on the question of bona fides that it is material to consider whether there was any consideration beyond the past debt. Assuming, however, that further consideration was necessary, there was

(1) (1884) 13 Q. B. D. 199.
(2) [1894] 2 Q. B. 180.
(3) (1856) 18 C. B. 757.
(4) (1886) 32 Ch. D. 512.
(5) (1793) 5 T. R. 235.
(6) (1876) 2 Ch. D. 104.
(7) (1869) L. R. 4 Ch. 622.

such consideration here. From the circumstances of the case the Court ought to infer that the husband forbore to press his wife for the payment of her debt to him in consequence of the further security given. That forbearance is a good consideration. Further, the husband advanced the money necessary for the due prosecution of the action against Lady Bromley, and he did so upon the faith of the assignment and for the purpose of rendering it productive. If he had not advanced that money, the plaintiff's solicitor would have had to pay the counsel's fees, and for that disbursement would have had a lien on the damages recovered; why should the assignee of the damages be in a worse position than the solicitor?

Holman Gregory, K.C., and *Arthur Page*, for the respondent. The decision of the Divisional Court was right and should be affirmed. The assignment was void under 13 Eliz. c. 5, having been made, as found by the Master, with intent to defeat or delay Mr. Hay. A deed made with such intent can only be supported under the statute if it was made for valuable consideration and bona fide. This deed was not given for valuable consideration for the Master's finding, which is apparently to the contrary, must be taken to mean that the only consideration was the antecedent debt, and the mere existence of an antecedent debt is not valuable consideration for this purpose. There must be in addition to the existing debt a forbearance to sue or some other consideration, such as a further advance contracted for at the time of the assignment or given ex post facto on the faith of the validity of the assignment: *Wigan* v. *English and Scottish Law Life Assurance Association* (1); *In re Barker's Estate*. (2) Here there was no evidence of any forbearance to sue either as a term of, or in consequence of, the assignment; and though the husband subsequently advanced money for the wife to enable her to pay her counsel's fees, there was nothing to show that it was advanced on the faith of the assignment. It was natural to suppose that he advanced it for the purpose of re-establishing his wife's reputation. But even if there was sufficient consideration to satisfy the statute, still the assignment was bad; it was not bona fide, for the assignor reserved to herself the benefit which would

(1) [1909] 1 Ch. 291. (2) (1875) 44 L. J. (Ch.) 487.

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result from the application of the damages in reduction of her mortgage debt.

Further, apart from the statute of Elizabeth the assignment was bad, for the subject-matter of it was not assignable. It was in substance an assignment of a right of action for a tort, and such a right of action is incapable of assignment : *Prosser* v. *Edmunds*. (1) Even if the subject-matter is to be regarded not as the cause of action itself, but merely as the fruits of the judgment in the action if and when recovered, still it was not assignable ; it was a mere expectancy, and a mere expectancy is not assignable even in equity without consideration: *Meek* v. *Kettlewell* (2) ; *In re Ellenborough* (3); and here for the reasons already given there was no consideration.

Shearman, *K.C.*, in reply, referred to *Torkington* v. *Magee* (4) ; *Dickinson* v. *Burrell* (5); *Anderson* v. *Radcliffe*. (6)

Cur. adv. vult.

April 22. VAUGHAN WILLIAMS L.J. read the following judgment :—This is an action in which a judgment creditor, Mr. Hay, seeks to attach a debt alleged to be due from Lady Bromley to Mrs. Glegg, the judgment debtor. Mr. Glegg, the judgment debtor's husband, resists the attachment on the ground that the debt sought to be attached was before the date of the garnishee proceedings assigned by a deed dated May 21, 1910, by Mrs. Glegg to him for good consideration, and that the judgment creditor stands exactly in the shoes of the judgment debtor, and that if the judgment debtor cannot impugn the deed as between herself as assignor and her husband as assignee, neither can the judgment creditor impugn it. Lord Coleridge J. in his judgment in the Divisional Court agrees that this is good law, at all events in a case where the assignment is not voluntary, but for good consideration, which in my opinion is the case here. Hamilton J. affirms this general rule, but says that it would not apply if the judgment creditor could in an independent action get a declaration to have the deed declared to be void

(1) (1835) 1 Y. & C. Ex. 481.
(2) (1842) 1 Hare, 464.
(3) [1903] 1 Ch. 697.
(4) [1902] 2 K. B. 427.
(5) (1866) L. R. 1 Eq. 337.
(6) (1858) E. B. & E. 806.

upon the general principle that he was a defeated and delayed creditor within the meaning of 13 Eliz. c. 5.

The answer to this is the same as the answer to a similar portion of the judgment of Lord Coleridge J.—the judgment creditor could not obtain such a declaration because, in my opinion, the assignment was for good consideration. I think this part of the judgment is based upon the assumption that there was no good consideration, express or implied, for the assignment.

I will now deal with the question whether there was good consideration. Before doing so, I wish to say a few words on the authorities. First there is *Alton* v. *Harrison*, where Giffard L.J. (1) says: "If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." Again, "If the deed is bona fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Compare per Parker J. in *Wigan* v. *English and Scottish Law Life Assurance Association*. (2)

In the early part of his decision Parker J. affirms a proposition with which I should imagine every one agrees—that is, that the mere existence of a debt is not good consideration in itself. One expects the assignment to be connected with some benefit or advantage which accrues to the assignor. Parker J. then proceeds to consider whether in that case there was good consideration or not. He says this: "It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt." I may say that I entirely agree with that proposition. He goes on: "If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time." The judgment of Parker J. was to a large extent founded

(1) L. R. 4 Ch. 622, at p. 626. (2) [1909] 1 Ch. 297.

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upon *Alliance Bank* v. *Broom* (1), where it was held by Kindersley V.-C. that the forbearance of the bank to enforce payment of the existing debt in consequence of the agreement to hypothecate certain warrants for the delivery of the goods mentioned in the letter made by the plaintiff bank constituted consideration, because it was to be inferred that "if on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it." Although, as Kindersley V.-C. states, "It is very true that, at any time after the promise," (i.e., the promise contained in the debtor's letter of September 19, 1864) "the creditor might have insisted on payment of his debt, and have brought an action." The Vice-Chancellor seems to base his judgment on the fact that the circumstances necessarily involved "the benefit to the debtor of a certain amount of forbearance which he would not have derived if he had not" written the letter of September 19 in answer to the plaintiffs' request for security of the debt due on loan account.

The benefit involved seems to be the benefit appearing upon the statement of fact made by the Vice-Chancellor in the preceding part of the passage I have quoted, which is as follows: "It appears to me, that when the plaintiffs demanded payment of their debt and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance." It appears to me that the consideration here referred to was not that the plaintiffs promised to abstain for any certain time from suing for the debt, for the Vice-Chancellor finds in terms that the creditor might have insisted on the payment of his debt and have brought an action, but only that the effect was that the plaintiffs did in effect give and the defendant received the benefit of some degree of forbearance. And in *In re Barker's Estate* (2) Jessel M.R. says: "But if, without that, after the voluntary instrument has been

(1) (1864) 2 Dr. & Sm. 289. (2) 44 L. J. (Ch.) 487, at p. 490.

executed, its contents are communicated to the person taking the benefit of it, and, acting upon the faith of it, he does substantially alter his position, that is, he does communicate to the donor his acceptance of the further security, and by so doing he gives value to the donor, being the value which the donor expected him to give, he has, in fact, accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, ex post facto."

The case of *Alliance Bank* v. *Broom* (1) was affirmed in very definite language by the House of Lords in *Fullerton* v. *Provincial Bank of Ireland* (2). In that case Lord Macnaghten says: "My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance Bank* v. *Broom* (1), to which my noble and learned friend Lord Lindley referred yesterday, and other cases, among which I may mention *Oldershaw* v. *King* (3), with the observations on that case and on the case of *Alliance Bank* v. *Broom* (1) by Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (4); and I may add that the proposition seems to be good sense."

From all those cases I infer not only that there must be good consideration, but that you ought to arrive at the conclusion that the act done, when it is done, was done in pursuance of the agreement made upon the assignment of the security. That is based largely upon the decision of Kindersley V.C. in *Alliance Bank* v. *Broom* (1), to which case I have already referred. Speaking for myself, if it had not been for the authoritative explanation given in the case of *Fullerton* v. *Provincial Bank of Ireland* (2), I should

(1) 2 Dr. & Sm. 289.
(2) [1903] A. C. 309.
(3) (1857) 2 H. & N. 517.
(4) (1886) 32 Ch. D. 266, at p. 289.

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have doubted whether Kindersley V.-C. did mean to say that it was essential to the good consideration in those cases that you should infer in any way that the agreement to give the security was a part of that which was contracted for. I should have thought, speaking for myself, that his words tolerably plainly shewed that he meant to include even a case where you could not say that it was originally contracted for at all, but where the assignor in fact took some benefit or other, not necessarily a benefit contracted for by the contract, but actually took a benefit, and that was a sufficient addition to make it a good consideration. There is one passage in the judgment of Kindersley V.-C. to which I should like to refer. He bases his judgment on this proposition, that the circumstances necessarily involved the benefit to the debtor of a certain amount of forbearance which he would not have derived if he had not written the letter of September 19 in answer to the plaintiffs' request for security of the debt due on loan account. "It appears to me," the Vice-Chancellor says, "that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance." Then he says, although it was to be inferred that if, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt and would have taken steps to enforce it, although, as Kindersley V.-C. states, it is true that at any time after the promise—that is, the promise contained in the debtor's letter of September 19, 1864—the creditor might have insisted on payment of his debt and brought an action. I do not know that I am justified in spending time in saying these words about what strikes me as being the true meaning of the Vice-Chancellor. A meaning has been put upon his judgment in the House of Lords in the case to which I have referred, and by Parker J. and by other judges in the same way.

But, taking these decisions into consideration, I entirely agree

with the conclusion that one ought only to connect the forbearance, or whatever else there might be, with the document of charge, and if you do that there is a good consideration. The answer to this is the same as the answer to a similar proposition by Lord Coleridge J.; the judgment creditor could not obtain such a declaration because, in my opinion, the assignment was for good consideration. I think this part of the judgment is based upon the assumption that there was no good consideration, express or implied, for the assignment.

I will now deal with the question whether there was good consideration. I think there was. The language of the deed of May 21, 1910, runs thus: "Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sums so owing to him the said Edward Maxwell Glegg as aforesaid, as she the said Florence Elizabeth Glegg doth hereby admit and acknowledge, she the said Florence Elizabeth Glegg doth hereby assign unto the said Edward Maxwell Glegg all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley* or under or by virtue of any verdict, compromise, or agreement which she may obtain or to which she may become party in or consequent upon the said action or otherwise howsoever under or by reason of the same To hold the same . . . . subject to redemption on payment of all moneys due to him." The recitals recite a now pending action, an action in the King's Bench Division of the High Court of Justice, wherein Florence Elizabeth Glegg, the wife, is the plaintiff and Lady Bromley is the defendant, being an action for damages against the defendant for slander, and continue: "And whereas the said Edward Maxwell Glegg has requested the said Florence Elizabeth Glegg to give him such further security for the said sum so owing to him under certain indentures of October 19, 1901, January 21, 1905, March 1, 1906, and November 28, 1906." It appears from the affidavits, and indeed it is not disputed, that subsequent to the execution of the said assignment Mr. Glegg did in fact advance his wife a large sum of money to enable her to pursue her action against Lady Bromley. I think that these advances, coupled with the fact that Mr. Glegg

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took no proceedings to call in the existing debt from his wife to him, constitute good consideration for the assignment, and prevent the assignment being treated as voluntary. The consideration for the assignment is not merely an existing debt.

There are some further matters which I have to consider. First, it is said that the consideration for the assignment was a cause of action, and that the cause of action was a tort, namely, a slander. I think that all that was assigned was the fruits of an action. I know no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on; in fact, the result of a compromise is actually included as a subject of the assignment. There is in my opinion nothing resembling maintenance or champerty in the deed of assignment. The second point is this. It has been said that this is an assignment of an expectancy within the meaning of the rule laid down in *In re Ellenborough.*(1) I think this was an assignment of property, and not of an expectancy. It is the assignment of property in the shape of the fruits of an action. Nor do I find anything in the case of *Torkington* v. *Magee* (2) to prevent Mr. Glegg enforcing this assignment of the fruits of this action.

Finally, I may say that I have taken it for granted throughout my judgment that mere preference of one creditor over another does not bring the case within the statute 13 Eliz. c. 5, even though the parties may have been minded to defeat a particular creditor.

Upon these grounds I think that the judgment of the Divisional Court was wrong, and that the decision of Master Chitty should be restored—that is to say, the result will be that this debt which has been sought to be attached by Mr. Hay as being a debt which was due to his judgment debtor cannot be so attached. I think I have already said that Mr. Hay stands exactly in the shoes of the judgment debtor, and that if as between her and the assignee, Mr. Glegg, she could not have questioned his right as against her to this debt, so neither can Mr. Hay assert anything which Mrs. Glegg, his judgment debtor, could have been prevented from asserting.

(1) [1903] 1 Ch. 697. (2) [1902] 2 K. B. 427.

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FLETCHER MOULTON L.J. In this case we have to decide between the claims of Mr. Hay and Mr. Glegg to a certain sum of money recovered by Mrs. Glegg from Lady Bromley in an action for slander. Mr. Hay bases his claim on a garnishee order garnisheeing this debt. Mr. Glegg bases his claim on an assignment anterior to the garnishee order, anterior also to the date at which Mr. Hay became a creditor at all, by which this debt was assigned, or a covenant was given by Mrs. Glegg to assign it, to Mr. Glegg by way of security for a large sum of money undoubtedly owing to him. Mr. Glegg's deed is, as I have said, anterior to anything on which Mr. Hay can base a claim, but on behalf of Mr. Hay it is said that the deed is void under the statute of 13 Elizabeth as being covenous, that is to say, fraudulent—intended to defeat creditors. I propose to decide this point first, because inasmuch as I can do so on the facts of the case I shall be saved the trouble of inquiring into some difficult legal points which would arise if the deed were in fact one of those to which the statute of Elizabeth relates. In my opinion the sole object of the deed was to transfer to Mr. Glegg by way of charge the future accounts therein referred to, and this was also its sole effect. It may fairly be regarded as a deliberate attempt to prefer Mr. Glegg to any creditors that might thereafter arise. I am not sure whether there were any creditors at the date at which the deed was actually made, but if so, it operated to give him a like preference over them.

Now it is well settled law that apart from the rules of bankruptcy a person may pay his debts in any order he pleases, and may charge his property as he will as security for paying those debts. The covenous assignments referred to in the 13 Elizabeth are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out and out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute, and, as the facts prove to my satisfaction that this assignment comes under that class, I am satisfied that there is nothing to be made of the suggestion that it was void under the statute of Elizabeth. The consequence of that is that we have here a valid assignment by Mrs. Glegg to her husband of

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property which might accrue in the future by way of charge. I am using the word "valid" here only in view of the statute of Elizabeth, and I mean therefore that we have here an assignment that is not invalidated by that statute. But the counsel who have argued most ably on behalf of Mr. Hay have raised two further difficulties. They claim that this was an assignment of future property. In olden times before the Judicature Act such an assignment would not be recognized in law. The parties would have had to go to equity to get it enforced, and equity would not enforce such an assignment if it was voluntary. Therefore prior to the Judicature Act you must have shewn that there was some good consideration for it before it would have had any practical operation, and they claim that the same effect must be given to it now. I am not disposed to disagree with them in their view of the law. I think that an assignment of future property does require to be something more than a mere voluntary assignment, a gift, in order that it may have legal operation. But there are two things to be remarked with regard to this particular assignment. In the first place it is an assignment by way of charge to a person who was a real creditor for a large sum of money, and, secondly, there is no doubt whatever that there was at this time not only this large debt in existence, but that it was gradually being paid off by Mr. Glegg out of the revenues of his wife's property which had been assigned to him, and which he was managing for the benefit of himself and his mortgagees.

It is under these circumstances that we find that the wife by this assignment adds to the security for the repayment of those debts, and when we look at the assignment we find that this purports to be done in answer to a request for further security from the husband. Now several cases, the most striking of which is the one which has been already referred to by the President of the Court, namely, *Wigan* v. *English and Scottish Law Life Assurance Association* (1), establish that the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security. If there has been pressure and in response to that pressure the further assignment is made, that suffices. But the cases also shew that even

(1) [1909] 1 Ch. 291.

if there has not been pressure, but there has been a further assignment, and it is known to the person who is the creditor and has the power to put pressure upon the debtor that a further assignment has been made, the law will, if it possibly can, give effect to the probability that the fact that the security has been increased will have influenced the creditor and made him more forbearing. I go so far as to say that in the absence of evidence to the contrary I should presume that the increase of the security when known would be responded to by an increase of forbearance on the part of the creditor. The cases, such as the one I have just mentioned, where the existence of an antecedent debt has been held not to be good consideration for a voluntary increase of the security, are cases where that voluntary increase of the security was not known to the creditor, and therefore could not possibly have influenced him in the way of forbearance. That feature is entirely absent here, and seeing that there was this heavy debt, and that the assignment of future property which would come in the way of cash would at once automatically operate in reducing the amount of the balances due on the mortgagee's accounts, I have come to the conclusion that we ought to find that there was good consideration here. I am not uninfluenced by the fact that after this increase in the security we find further advances made by the creditor to the debtor. I do not suggest that they were stipulated for when the assignment was made, but I think they indicate that which the Courts would naturally expect, namely, that an increase of security produced an increase of forbearance. I am therefore of opinion that the objection to this assignment on the ground that there was no good consideration for it fails.

Finally it was urged that that which purported to be assigned to the husband was in substance a cause of action for personal wrong. What was assigned to him was whatever should come from an action of slander which had been brought by Mrs. Glogg against Lady Bromley, and it was urged that such an interest was incapable of being validly assigned. For this purpose we must look carefully at the language of the deed, because Mr. Hey by virtue of his garnishee order stands exactly in the position of Mrs. Glogg herself. He cannot succeed unless Mrs. Glogg was

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in such a position that she could have taken the money arising from the action and refused to give it to her husband. If she could, then she was the beneficial owner of it, and Mr. Hay has taken her place. If, on the other hand, she could not keep it herself because of that which had passed between her and her husband, then Mr. Hay cannot make good his claim to it. Now the relevant words in the assignment—which commences by referring to the assignments of all the debts and securities which had already been given and all the previous history of the matter—are these: "And whereas the said Edward Maxwell Glegg has requested the said Florence Elizabeth Glegg to give him such further security for the said sums so owing to him under the said indentures of the 19th day of October, 1901, the 24th day of January, 1906, the 1st day of March, 1906, and the 28th day of November, 1906, as is hereinafter contained which she has agreed to do"—a recital which we must take for our purposes as being true—"Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sums so owing to him the said Edward Maxwell Glegg as aforesaid, as she the said Florence Elizabeth Glegg doth hereby admit and acknowledge, she the said Florence Elizabeth Glegg doth hereby assign unto the said Edward Maxwell Glegg all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley*, or under or by virtue of any verdict, compromise, or agreement which she may obtain or to which she may become party in or consequent upon the said action or otherwise howsoever under or by reason of the same." We are all agreed that you cannot assign a cause of action for a personal wrong, and I am not sure that some of the words here might not bear a meaning which would cover such an assignment. But if this be so the only effect would be that those particular words would be inoperative. Their presence would not invalidate the whole deed, because there is nothing in the way of maintenance or champerty in this assignment. It is clearly intended to assign the fruits of the action, so that whatever benefit comes from the action shall go to Mr. Glegg by way of further security, but there is nothing which gives him the

right to intervene in the action or which is in any way against public policy. So that I do not trouble myself to consider whether there are any words which may be such that they could not be supported. What I find is that there are words which do clearly assign whatever sum of money comes as the fruit of the action. They therefore purport to assign property defined by the source from which it comes as and when it becomes property, and that being so, I can see no valid legal reason why an assignment of property so defined should not be valid, provided the assignment is such that it is a good assignment in respect of property arising in the future. A sum of money coming into the possession of Mrs. Glegg, (or to which she establishes her right so that it is the same as if it came into her possession,) is property, and I decline to make any difference with regard to this money by reason of the source from which it comes. I am of opinion therefore that we must treat it as property becoming the property of Mrs. Glegg in the future, clearly assigned by the words of the deed, and that being so, seeing that I hold that this deed was for good consideration, I must hold that the proceeds of the action did pass to Mr. Glegg under the assignment, and that his title prevails over that of Mr. Hay.

Parker J. I also am of opinion that this appeal ought to succeed. In the first place, I think that according to the true construction of the mortgage in question the subject-matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action. It is, I think, necessary to bear this distinction in mind, particularly in view of the course taken by the argument of counsel for the respondent. Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment

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of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule. It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass. It is clear, therefore, that no question of maintenance can ever arise. Thus, in the present case, as I construe the mortgage, the mortgagor remains at liberty to proceed or not with the slander action as she may think fit. The mortgagee has no right and is under no duty to interfere. The mortgage, therefore, is open to no objection on the ground of maintenance, nor is it open to any objection on the ground of champerty. Champerty, after all, is only a particular form of maintenance. This appears to be reasonably clear from such cases as *Sprye* v. *Porter* (1) and *Rees* v. *De Bernardy*. (2) Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty. This doctrine is well established by the case of *Davis* v. *Freethy*. (3) I can find no trace in the authorities of any distinction having been drawn in this respect between

(1) (1856) 7 E. & B. 58.
(2) [1896] 2 Ch. 437.
(3) (1890) 24 Q. B. D. 519.

actions based on personal tort and other actions; nor do I see why on principle there should be any such distinction. I am of opinion, therefore, that there is nothing to avoid the mortgage on the ground of public policy. For every equitable assignment, however, there must be consideration. If there be no consideration, there can be no equitable assignment. This appears from *Tailby* v. *The Official Receiver* (1) and *In re Ellenborough*. (2) Now the question whether in this case there was or was not consideration for the equitable assignment was certainly before the Master and it was argued. As far as I can gather by his notes the case of *In re Ellenborough* (2) was quoted to him and the Master decided that there was consideration, distinguishing the case of *Wigan* v. *English and Scottish Law Life Assurance Association*. (3) The ratio decidendi of that case was clearly that there could have been no forbearance or alteration of position on the part of the mortgagee on the strength of the new security because he had no notice of it whatever, and it is precisely on that ground the Master distinguished the case of *Wigan* v. *English and Scottish Law Life Assurance Association* (3) from the case which was before him. In other words, in my opinion, the Master came to the conclusion that there was consideration because the mortgagee was aware of the mortgage and acted, or forbore to act, upon the faith of it, and this, according to the authorities, is sufficient consideration. I see no reason myself to differ from this conclusion. I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security, and I cannot think that this inference is rebutted by the fact that the reason why he asks for the further security is his desire to obtain a benefit for himself at the expense of another creditor who may shortly be in a position to take the subject-matter of the proposed security in execution. The Court below appears to have adopted the Master's finding that the mortgage was a valid and operative assignment at any rate as against the mortgagor, a finding which involved the existence of consideration, but at

(1) (1888) 13 App. Cas. 523. (2) [1903] 1 Ch. 697.
(3) [1909] 1 Ch. 291.

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the same time they held that as against the respondent the mortgage was void under 13 Eliz. c. 5 on the ground that it was a voluntary assignment. If the assignment was operative at all, it can only have been on the ground that it was not voluntary, but that there was good consideration for it.

The only remaining point is, I think, that which was argued under the statute of 13 Eliz. c. 5. Now the scheme of that statute is this: By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso, it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent. Now in the present case it is really quite unnecessary to consider the proviso, for every one is agreed, and I think it is quite clear on the evidence, that if there was any fraudulent intention, the mortgagee had notice of it. The question therefore is really a question which reduces itself to this: Does a debtor who gives his creditor security with the intention of preferring him to other creditors or another creditor, and consequently defeating or delaying such other creditors or creditor, have an illegal intention within the meaning of the statute? In my opinion it is well decided that he has not, and as far as I can gather no distinction has ever been drawn in the cases between a preference given for fresh security and a preference given without any fresh security.

As a matter of fact it is unnecessary for the purposes of this case to consider that point, for, as I have said before, if the

mortgage is good in any way at all it must be because there was consideration.

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Appeal allowed.

Solicitor for appellant: *F. S. Randolph.*
Solicitors for respondent: *Meredith, Mills & Clark.*

W. J. B.

[IN THE COURT OF APPEAL.]

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THE MAYOR, ALDERMEN, AND BURGESSES OF SWANSEA, APPELLANTS *v.* HARPUR, RESPONDENT.

Waterworks—Breaking up Street—Laying Water Pipe therein—Subsequent Subsidence of Street—Cost of Repair—"Compensation for any damage"—"Recovery of damages not specially provided for"—Jurisdiction of Justices—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 85.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may open and break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." By s. 85, "with respect to the recovery of damages not specially provided for" the Railways Clauses Consolidation Act, 1845, is incorporated with that and the special Act; and by s. 140 of the Railways Clauses Consolidation Act, 1845, the amount of such damages shall, in case of dispute, be ascertained and determined by two justices.

Undertakers for the supply of water to a borough under a special Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under those statutory powers opened and broke up the soil of a public road, which was within the district of and repairable by the county council, and laid a water pipe therein, and the road was then filled in and restored to its proper condition. The whole of the work was carried out in a proper, efficient, and workmanlike manner under the supervision of the surveyor to the county council. Eight months after the completion of the work a portion of the road had a bank supporting it slipped, and the county council repaired the damage at a cost of 87*l.* The damage was the result of laying the water pipe in the road. The county council preferred a complaint before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage:—

Held, that the claim was not properly made under s. 28 of the Waterworks Clauses Act, 1847, as not being a claim for compensation for

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damage done in the execution of the undertakers' powers; that the compensation claimed was not "damages the recovery of which is not specially proved for" within the meaning of s. 85; and that therefore two justices had no jurisdiction under s. 140 of the Railways Clauses Consolidation Act, 1845, to ascertain and determine the amount of such damages.

Decision of a Divisional Court [1912] 2 K. B. 16, reversed.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Pickford and Avory JJ.) upon a case stated by justices for the county of Brecon, reported [1912] 2 K. B. 16.

A complaint was preferred by the respondent, the surveyor to the county council, against the appellants under s. 28 of the Waterworks Clauses Act, 1847, which was incorporated in the Swansea Corporation Water Act, 1905 (1), for that on December 16, 1910, at the parish of Ystradgynlais, in the county of Brecon, the appellants, being the persons authorized by the Swansea Corporation Water Act, 1905, to open and break up the soil of a certain road situate in the parish of Ystradgynlais, doing as little damage as might be, and making compensation for any damage done in the execution of the powers conferred upon them by the Act, did so damage the said road as to cause a portion thereof to give way and fall into the river adjoining thereto, the said road being vested in the county council of Brecon, who were responsible for its maintenance and who were entitled to be paid compensation in respect of the said damage in accordance with the provisions of the said Act and of the Waterworks Clauses Act, 1847, therewith incorporated. The sum claimed in the particulars of claim was 87*l.* 10*s.* for building a retaining wall and other works in making good the damage caused by the slipping of the road.

Upon the hearing the following facts were proved or admitted.

Under the Swansea Corporation Water Act, 1905, the appellants laid a water pipe, twenty-four inches in diameter, in a certain highway in the county of Brecon, known as the Ystradgynlais main road, which was in the district of and maintainable by the county council of Brecon, to carry water from the appellants' reservoir at Cray, in the county of Brecon, to Morriston, in the county borough of Swansea, for the purposes of the water undertaking.

(1) See note on p. 508, post.

On December 16, 1910, more than eight months after the laying of the water pipe was completed, a portion of the highway and the river bank supporting it to the extent of fifty feet slipped into the river.

The work of cutting the trench and of laying the water pipe therein was carried out in accordance with deposited parliamentary plans in a proper, efficient, and workmanlike manner after notice served upon the respondent, who made no objection to the position of the water pipe in the highway, and the statutory powers in connection with such work were properly and duly complied with. After the water pipe had been laid in the trench the same was filled, rammed or punned, and the road was restored to its original condition. The trench was opened, the water pipe laid, and the road reinstated in the presence and under the superintendence of the respondent, his officers or servants.

It was contended on behalf of the respondent that the damage done to the road in question, which caused a portion thereof to give way and fall into the river adjoining, was due to the laying by the appellants of a line of pipes in the highway as above stated under their powers contained in the Swansea Corporation Water Act, 1905, and that the respondent was entitled to be paid compensation for the damage done under s. 28 of the Waterworks Clauses Act, 1847.

It was contended on behalf of the appellants that the damage, even if caused by the appellants' operations, which was not admitted, was not within s. 28 of the Waterworks Clauses Act, 1847, under which the complaint was brought, and that even if compensation were payable under that section, which was not admitted, s. 85 of the Act, dealing with the recovery of damages not specially provided for, did not empower the recovery of "compensation," and also that such section, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, did not give the justices jurisdiction to deal with the complaint.

The justices were of opinion that the damage to the portion of the highway and the river bank was the result of the appellants laying the water pipe in the highway as aforesaid. They were further of opinion that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, and that they had

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jurisdiction to deal with such claims under the sections hereinbefore referred to. They therefore ordered the appellants to pay to the respondent the cost of the repair of the highway, namely, 87*l.* 10*s.*, and his taxed costs.

The questions for the opinion of the Court were whether, upon the above statement of facts, the damage, if caused by the appellants' operations, was within s. 28 of the Waterworks Clauses Act, 1847, and, if within that section, whether s. 85 of the Act, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, applied, and gave jurisdiction to the justices to deal with the complaint.

The Divisional Court held that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, as being a claim for compensation for damage done in the execution of the powers of the undertakers; that the compensation claimed was "damages" the recovery of which was not specially provided for within the meaning of s. 85; and that, therefore, under s. 140 of the Railways Clauses Consolidation Act, 1845, two justices had jurisdiction to ascertain and determine the amount of such damages.

The appellants appealed.

Macmorran, K.C. (*Cuthbertson* with him), for the appellants. It is admitted by both parties that the damage to the road was the unavoidable result of the appellants' operations. The appellants raise two contentions—first, that it is not a case of compensation for damage done by them in the exercise of their powers under s. 28 of the Waterworks Clauses Act, 1847; and, secondly, that the justices had no jurisdiction to deal with the matter. As to the first point, the group of sections beginning with s. 28 provides for the breaking up of streets and for damage done in breaking them up, but not for damage which may arise afterwards. As the work of opening up the road and laying the pipe was properly done, no action would lie for negligence in carrying out the work. Where works authorized by statute are carried out without negligence, the undertakers are not in general liable to an action or other proceeding for nuisance unless expressly rendered liable by statute. For example, under s. 29 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), and s. 9 of the

Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), the undertakers are liable to an indictment or action for a nuisance caused by them, and in *Midwood & Co.* v. *Manchester Corporation* (1) undertakers for the supply of electrical energy were held similarly liable under a clause in their provisional order. But there is no such provision in the Waterworks Clauses Act, 1847.

Further, even if compensation is payable under s. 28 of the Waterworks Clauses Act, 1847, s. 85 of the Act, upon which the respondent relies, has no application. Sect. 85 applies only to "the recovery of damages not specially provided for," but no question of "damages" arises in the present case, the claim under s. 28 being for "compensation" for damage done in the execution of the undertakers' powers. "Compensation" can be claimed under s. 6 of the Act, which provides that the amount of such compensation shall be determined in the manner provided by the Lands Clauses Consolidation Act. The proper course was therefore to take proceedings under the Lands Clauses Consolidation Act, 1845, to assess the compensation for the injurious affection of the land caused by the execution of the works, and as the amount of the claim exceeded 50*l.* the compensation must have been assessed by arbitration or by the verdict of a jury; the justices could have no power to assess it. The recovery of compensation being specially provided for by s. 6 of the Act, s. 85, which applies s. 140 of the Railways Clauses Consolidation Act, 1845, to cases where the recovery of damages is not specially provided for, has no application. But the appellants rely in the first place upon their contention that s. 28 has no application where no injury is done by the execution of the works. [He also cited *Green* v. *Chelsea Waterworks Co.* (2)]

John Sankey, K.C. (*Francis-Williams, K.C.*, and *Gathorne-Hardy* with him), for the respondent. The earlier part of the Waterworks Clauses Act, 1847, consists of three groups of sections, ss. 6 to 15, ss. 16 and 17, and ss. 18 to 27, all of which deal with the taking of private property, and each of which has its appropriate remedy, but the present case does not fall within any of these groups. It is a case where the appellants have exercised their powers under s. 28 of the Act of opening and breaking up

(1) [1905] 2 K. B. 597. (2) (1894) 70 L. T. 547.

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a street and laying a pipe therein. The highway authority can only claim compensation for damage done in the execution of their powers by the undertakers. "Compensation for any damage" in s. 28 means the same thing as "damages" in s. 85, and, as the recovery of compensation for damage under s. 28 is not specially provided for, s. 85 applies to the case. That being so, s. 140 of the Railways Clauses Consolidation Act, 1845, also applies, and the justices had jurisdiction to assess the amount of the compensation.

Macmorran, K.C., in reply, cited *East Fremantle Corporation* v. *Annois*. (1)

Cur. adv. vult.

June 10. VAUGHAN WILLIAMS L.J. This matter having been discussed at some length in the judgments of the Lord Chief Justice and Avory J., I think perhaps it is more respectful to the Divisional Court to state the facts upon which the matter is decided. Of course, those facts do really appear in the special case, but it is better, perhaps, in one's judgment to shew the way in which one deals with the application of the sections which have been referred to in argument. Therefore I have jotted down a short judgment. It is longer than I intended it to be, but I think on the whole perhaps I had better read it.

The questions put to us in this case in the case stated are: First, "whether, upon the facts stated in the case, the damage, even if caused by the appellants' operations, is within s. 28 of the Waterworks Clauses Act, 1847." I might say at once that I do not think it is within that section. And, if within that section, whether s. 85 of the said Act empowers the respondents to recover compensation in respect of the damage the subject of this appeal, such damage not being damages "not specially provided for," and whether s. 85, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, gives jurisdiction to the justices to deal with the complaint. Sect. 28 of the Waterworks Clauses Act, 1847, runs thus: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets

(1) [1902] A. C. 213, at p. 217.

and bridges within the limits of the special Act, and may open and break up any sewers, drains or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." Presently I shall have a word to say about these words "and do all other acts which the undertakers shall from time to time deem necessary." Paragraph 3 of clause 8 of the case states that "The work of cutting the trench and of laying the said water pipe therein was carried out in accordance with deposited parliamentary plans in a proper efficient and workmanlike manner after notice served upon the respondent, who made no objection to the position of the said waterpipe in the said highway, and the statutory powers in connection with such work were properly and duly complied with. After the said water pipe had been laid in the said trench the same was filled, rammed or punned and the road was restored to its original condition. The trench was opened, the water pipe laid and the road reinstated in the presence and under the superintendence of the respondent, his officers or servants." Then clause 9 of the case states that "At the hearing before us the respondent contended: That the damage done to the road in question, which caused a portion thereof to give way and fall into the river adjoining, was due to the laying by the appellants of a line of pipes in the said highway as stated, under their powers contained in the Swansea Corporation Act, 1905, and that the respondent was entitled to be paid compensation for the damage done under s. 28 of the Waterworks Clauses Act, 1847." That, of course, was on the assumption that s. 28 applied to that, which I do not think it did in the circumstances of this case.

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Then Mr. Macmorran further contended that the damage aforesaid, even if caused by the result of the appellants' operations, which was not admitted, was not within the said s. 28 of the Waterworks Clauses Act, 1847, under which the complaint was brought, and that even if compensation were payable under that section, which is not admitted by the appellants, s. 85 of the said Act, dealing with the recovery of damages not specially provided for, as the words of the section are, does not empower the recovery of compensation, and also that such section, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, does not give the justices jurisdiction to deal with the complaint. Really at that point in my judgment I might stop, and say nothing else, because the views I have already expressed shew that in my judgment the judgment of the Divisional Court was wrong, but as there are some other observations which I think might be usefully made, I will just make them very shortly.

Mr. Macmorran, for the appellants, argued that s. 28 did not apply to this case, and gave no jurisdiction to assess compensation. This is Mr. Macmorran's argument, as I understand it: that s. 28 applies to compensation for any damage which may be done in the execution of statutory powers, that is in this case the power to break up the streets. The damage here done was not done in the exercise of those powers; the damage occurred long after the execution of the statutory work had been completed, and properly completed, as appears in paragraph 3 of the case. I want to say here that I am not affirming that particular argument of Mr. Macmorran as to the date when the damage occurred: I am not deciding it one way or other. It was further argued that, even if s. 28 does provide that compensation is payable, yet s. 28 makes no provision as to how the compensation is to be assessed, and s. 85, which the respondent suggests supplies the mode of assessment, to wit, the justices, does not apply to compensation, but only to the recovery of damages not specially provided for, and of penalties, and before us the argument was put forward that if s. 85 was not applicable, and no special provision for the assessment of these damages was to be found elsewhere in the Act, the

proper inference was that it was not intended by the Legislature in this Act that the undertaker should incur any liability in respect of matters occurring after the authorized work had been properly executed in accordance with the parliamentary plans, which the case finds to be the fact here, and that the proper method of assessing compensation, if you read the word "damages" in s. 85 as covering "damage" in s. 28,—that is the section which I have already said I do not think applies—would be by arbitration or by the verdict of a jury, that the justices had no jurisdiction, and that the application of s. 85 was specially provided as the method of recovery of compensation. Before passing to the argument on behalf of the respondent, I want to say that in my judgment s. 6 has no application to the recovery of damages in the sense that that word is used in s. 85, and further to say that in my opinion the proper conclusion from all this is not that there is no remedy, but that, having regard to the words at the conclusion of s. 28, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers," there is a remedy by action at common law. This seems to me to be the effect of the decision in *Bentley* v. *Manchester, Sheffield and Lincolnshire Railway* of Romer J. (1)

Now as to the contention of the respondent, it really comes to this, that the word "compensation" in s. 28 has the same meaning as "damages" in s. 85, and that, reading "compensation for any damage" as having that meaning, compensation for damage under s. 28 is not specially provided for, and s. 85 applies. I cannot agree with that contention, and I have come to the conclusion that the justices had no jurisdiction, and that even if it is not possible to assess damage by arbitration this does not justify the conclusion that if that assessment cannot be arrived at under s. 85 there can be no remedy at all. The case of *Bentley* v. *Manchester, Sheffield and Lincolnshire Railway* (1), which I have just cited, seems to make it clear that there would be a remedy by way of a common law action. Therefore I think this appeal must be allowed.

May I add one word? I do not mean by this judgment to

(1) [1891] 3 Ch. 222.

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decide anything as to the effect of the words "and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." Therefore, the result of my judgment is that this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The claim of the respondent here is based on an alleged right to recover 87*l.* 10*s.*, (which is the amount at which his claim has been assessed by the justices,) from the appellants by virtue of the provision of s. 28 of the Waterworks Clauses Act, 1847. In order to establish that claim he must shew two things: he must first shew that s. 28 does entitle him to a pecuniary remedy in respect of the matters that have happened in this case, and next he must shew that he has gone to the right tribunal to enforce his claim. Now with regard to the first point I am of opinion that s. 28 does not apply to such a claim as the present. The facts found by the justices are expressed in very clear language, and, although I confess that I do not understand how this destruction of the road was in fact caused, I must take it from the findings of the justices that the pipe was properly put down by the appellants, that the road was duly restored by them, that they were not guilty of any negligence or default with regard to the pipe, but that a consequence of that pipe being placed there and duly maintained was the damage which is represented by the 87*l.* 10*s.*

Now, on looking at s. 28 and weighing carefully the language used throughout the section, I am of opinion that s. 28 refers to acts to be done by the appellants in breaking up the streets to lay down their pipes, in reinstating those streets, in taking them up again when anything is necessary for the purpose of maintenance, and once more properly reinstating them, but I do not think that it is intended to relate to the natural and inevitable consequences of the presence of their pipes under statutory powers in those streets, but only to the acts done

by them in putting and maintaining those pipes there. The words are: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits." The whole of that catalogue consists of acts done, as I have said, in putting down and maintaining the pipes under the streets and in properly reinstating the streets, and it relates to nothing else. Then the section goes on, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." In my opinion, the words "doing as little damage" refers wholly to the acts to which the section has previously referred. Therefore, in order to see whether this claim comes under s. 28 I must consider whether what has happened here,—the matter for which the claim is made,—is damage done by the appellants in the acts to which s. 28 alone refers. In my opinion it was not. It is clearly found that the pipes were properly laid, and that the streets were properly reinstated. The events which have put the appellants to pecuniary loss are the natural consequences of the exercise of the right to put the pipes there, but they are not the consequence of what was done in the actual execution of the powers of the Act. To my mind, the true analogues to the present case are the cases which relate to damage done to a road without negligence, but in consequence of the presence of the pipes there, as, for instance, the case of *Gray* v. *Chelsea Waterworks Co.* (1), where a pipe burst and did damage to a private individual. The Courts have established that in such cases where there is

(1) 70 L. T. 547.

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no negligence the water company is not liable. It has obtained from the Legislature those privileges, and if it properly exercises its rights it is not liable for damages unless it has been guilty of some neglect or default. It was no doubt the presence of the pipe that led to this mischief, it was certainly not through any default or negligence; it was simply due to the fact that the pipe was there, and therefore, in my opinion, it was not damage done in the execution of the powers within the meaning of these words as appearing in s. 28.

I am, therefore, of opinion that there is no valid claim under s. 28 against the appellant company, whatever be the tribunal to which the respondent has had recourse in order to obtain relief.

This suffices to decide the case in favour of the appellants. But there is another point of equal importance which has been discussed, and, as it also goes to the root of the claim, I think it is my duty to decide it also. Justices, of course, do not form a tribunal to which in ordinary cases His Majesty's subjects can go to enforce pecuniary claims. They must have a special jurisdiction given to them by some statute. In the present case the respondent contends that the necessary jurisdiction has been given to the justices by the clause which is set out in the special case, namely, s. 140 of the Railways Clauses Consolidation Act, 1845, which would come into operation if this claim came within the scope of s. 85 of the Waterworks Clauses Act, 1847. This section reads as follows: "If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act"; and on turning to s. 140 of the Railways Clauses Consolidation Act, 1845, we find that it says: "In all cases where any damages, costs or expenses, are by this or the special Act, or any Act incorporated therewith, directed to be paid and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices." That is the procedure which has been followed in the present case. Therefore, what we have to consider is whether,

supposing that there is a claim under s. 28 for this sum, the enforcement of that claim is the recovery of damages not specially provided for. Of penalties it clearly is not. If it is not the recovery of damages not specially provided for, then s. 85 does not apply, and it follows that s. 140 of the Railways Clauses Consolidation Act, 1845, does not apply either. The words "damages" and "damage" in law have more than one meaning, and great care has to be exercised in examining the context in which they severally appear. "Damage" may mean injury; "damage," and "damages" especially, may mean sums paid under the order of the Court for compensation for a breach of contract or a wrong. First of all we have to consider the words of s. 28. That section gives to the appellants the right to do these acts, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." In such a context there is no distinction between the word "damage" and the word "injury." Damage is frequently in law associated with the idea of a wrongful act, the word "damages" almost always so, but it is clear that s. 28 entirely removes any wrongfulness from the acts that the appellants do, and the compensation is to be given, not in respect of wrongful acts, but in respect of the injury which the physical acts of the corporation have done to property which belongs to other parties. Therefore s. 28 is to be interpreted exactly as though the word "injury" had been substituted for "damage" in the two places where it occurs. What s. 28 gives is compensation for interference with property, and the injury resulting therefrom. But when I turn to s. 85 I have no doubt whatever that "with respect to the recovery of damages" means the recovery of pecuniary compensation for wrongful acts, which is the normal meaning of the word "damages" in a legal sense. Mr. Macmorran has shown to us that there are cases where damages are provided for, but where no special tribunal for assessing those damages is provided for. All such cases will come under s. 85 and will be properly adjudicated upon by the tribunal of the justices which was employed in this case. But here under s. 28 the respondent is to have pecuniary indemnity, no doubt; he is

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to have compensation, but it is compensation for a physical injury and not for a wrongful act, and I have no doubt, therefore, that the reference to recovery of damages would not cover the recovery of compensation under s. 28, even if the facts were such as to entitle the parties to such compensation.

In the very admirable argument that we heard on behalf of the respondent there was a careful examination of s. 6, which provides for the use of the machinery of the Lands Clauses Consolidation Act for the purpose of determining compensation. This was for the purpose of shewing that those provisions do not apply that machinery to compensation to be recovered under s. 28. I confess that, although I do not decide it, the argument made a very considerable impression on my mind, but it appears to me that we are not required to determine what is the tribunal that is empowered to assess the compensation under s. 28. We have only to consider whether the justices had any power to adjudicate on such a matter, and, as I have come to the conclusion that they had not, I decline to enter into the question whether the use of the word "compensation" is sufficient to attract to it that machinery which is so constantly used for ascertaining the compensation to be paid under Acts of this kind, or whether s. 28 simply gives a legal right to indemnity for mischief done to private property and leaves it to be obtained in the ordinary way by appeal to the Courts of law. On that point, therefore, I pronounce no opinion.

The result of my judgment is that I agree with the President that this appeal must be allowed with costs here and below.

BUCKLEY L.J. The case finds as a fact that the works were done in a proper, efficient, and workmanlike manner. In other words, there was no negligence. Under those circumstances, both upon principle and upon the decision of this Court in *Green* v. *Chelsea Waterworks Co.* (1), there is no liability in the persons executing the works except such as is created by statute. Turning, then, to the Acts of Parliament that relate to this matter, I am of the following opinion: First, s. 28 of the Waterworks Clauses Act, 1847, has no application to the present case. That is a section

(1) 70 L. T. 547.

which has to do with the construction and carrying out of certain works, and it is enacted by that section that in the construction and carrying out of such works the undertakers shall do "as little damage as can be in the execution of the powers hereby or by the special Act granted." The damage which is next mentioned is the same damage as is mentioned in those words; the undertakers are to make compensation for any damage which may be done in the execution of such powers. In my judgment the damage dealt with by the section is damage done in the execution of to the exclusion of damage subsequently resulting from the execution of the powers. What happened here as regards the execution of the works? Everything was done in a proper, efficient, and workmanlike manner, but subsequently, some eight months after the work had been completed, a portion of the highway and river bank to the extent of a distance of fifty feet slipped and sank. In my judgment that was not within s. 28. But secondly, if it were within s. 28, then the compensation for that damage is not damages to which s. 85 can relate. Compensating a person in damages and making compensation to a person for damage done are two different things. Damages, in the proper sense of the word, exist only where the person who is to pay damages has done the person who is seeking damages some wrong. That is not the case here. The person who laid this pipe was doing that which he had a right to do; the statute had authorized him to do it. In the course of that he may have occasioned injury to the other person, and what the statute has done is this: it has given the one the right to do the act, and has created in the other the right to payment of a sum of money if in doing that rightful act the former has caused injury to the latter. That is not damages. Sect. 28 refers, in my opinion, to compensation for injury done in the execution of the power. The person executing the powers is doing that which is right; the other party sustains no damages by reason of wrong done, but by virtue of the statute becomes entitled on his part to a sum of money to be paid by the person executing the works by way of compensation for the injury which is done to him in the execution of the works. For these reasons it seems to me that s. 85 has

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nothing to do with the matter. If s. 85 has nothing to do with the matter, it follows that the jurisdiction is not in two justices.

Thirdly and lastly it was asked, if the jurisdiction is not in two justices where is it? It is really unnecessary to answer that question. The party who comes here to sustain the proposition that the jurisdiction is in two justices must establish the affirmative of that; it does not avail him to say "If it is not there where is it? I do not hesitate, however, to answer the question. I do not see any difficulty. If there be an Act of Parliament which creates a right in some one subject of the realm to demand money from another subject of the realm, and no special tribunal is named, the tribunal to which resort should be had is a Court of justice. I have no doubt that in order to enforce the right to compensation, if there were any, there would be a resort to the High Court of Justice. It appears to me therefore that this appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *H. Lang Coath, Swansea.*

Solicitors for respondent: *Field, Roscoe & Co., for D. W. E. & M. F. Thomas, Brecon.*

NOTE.—Swansea Corporation Water Act, 1905 (5 Edw. 7, c. xciv.), s. 2: "The following Acts (so far as the same are applicable for the purposes and are not inconsistent with the provisions of this Act) are hereby incorporated with this Act (namely):—

"(1.) The Waterworks Clauses Acts, 1847 and 1863, except—

"(*a*) The words 'with the consent in writing of the owner or reputed owner of any such house or of the agent of such owner' in section 44 of the Waterworks Clauses Act, 1847;

"(*b*) Sections 75 to 82 of the Waterworks Clauses Act, 1847, with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit, and section 83 relating to accounts:

"(2.) The Lands Clauses Acts (except s. 127 of the Lands Clauses Consolidation Act, 1845)."

Sect. 12: "(1.) The provisions of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets shall apply with the necessary modifications to the construction, laying down, erection, and maintenance in any streets or roads of the aqueducts authorised by this Act, and of any discharge pipes, telephone or telegraph posts, wires, conductors, or apparatus, which the corporation may and which they are hereby authorised to erect or lay down for the purposes of their water undertaking."

Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6: "Where by the special Act the undertakers shall be empowered, for the purpose of

constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and, if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845 . . . and shall make to the owners and occupiers of and all other persons interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act or any Act incorporated therewith; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively for determining questions of compensation with regard to lands purchased or taken under the provisions thereof . . . ."

Sect. 28 (under the heading, "And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows"): "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 85 (under the heading, "And with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices or to the sheriff, be it enacted as follows"): "If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices shall be incorporated with this and the special Act . . .

Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 140: "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the manner of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices . . . ."

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[IN THE COURT OF APPEAL.]

MINTURN *v.* BARRY.

London—Building—Party Wall—Dispute as to Method of repairing Defective Party Wall—Previous History of Wall—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88, 90, 91.

The tribunal adjudicating under the London Building Act, 1894, upon a dispute between a building owner and an adjoining owner as to the mode of repairing a defective party wall is not entitled to take into consideration the history of the wall previous to its becoming a party wall.

Appeal of the applicant, the building owner, from the decision of a Divisional Court (Bankes and Lush JJ.).

By s. 88 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) a building owner has the following rights in relation to party structures :—(1.) A right to make good underpin or repair any party structure which is defective or out of repair . . . . (11.) A right to perform any other necessary works incident to the connection of a party structure with the premises adjoining thereto.

By s. 90, sub-s. 1, "a building owner shall not except with the consent in writing of the adjoining owner . . . . exercise any of his rights under the Act in relation to any party wall or party structure . . . . unless within the time specified he has served on the adjoining owner a party wall or party structure notice stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced."

By s. 91, sub-s. 1, "where a difference arises between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of the Act relates unless both parties concur in the appointment of one surveyor they shall each appoint a surveyor and the two surveyors so appointed shall select a third surveyor and such one surveyor or three surveyors or any two of them shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by his or their award to determine

the right to do and the time and manner of doing any work and generally any other matter arising out of or incidental to such difference . . . ."

By sub-s. 2, "any award given by such one surveyor or by such three surveyors or by any two of them shall be conclusive and shall not be questioned in any Court with this exception that either of the parties to the difference may appeal therefrom to the county court within fourteen days from the date of the delivery of the award and the county court may subject as hereinafter mentioned rescind the award or modify it in such manner as it thinks just."

The plaintiff was the freeholder of a house, No. 14, Chelsea Embankment, and was a building owner within the meaning of s. 5 of the Act. The defendants Sir J. Wolfe Barry and the London County Council were respectively the tenant and the freeholders of the adjoining house, No. 15, Chelsea Embankment, and were adjoining owners within the meaning of the Act.

The plaintiff alleged that No. 14 was being injuriously affected by dampness, which, as she alleged, came through the party wall between No. 14 and No. 15 and rendered uninhabitable several rooms in the basement of No. 14. This party wall had been originally built as a garden wall, and was not then intended to be, although it had by subsequent user become, the party wall of adjoining buildings. The wall at the date of these proceedings was still sufficient for the purposes for which it had originally been built.

On June 2, 1910, the plaintiff gave to the defendants a party structure notice, stating that she intended after the expiration of two months to exercise the rights given to her under s. 88 of the London Building Act, 1894, and, among other things, to enter upon No. 15, dig down to the foundations of the party wall, and, if there were no damp proof course, insert a horizontal damp proof course for the full thickness of the wall, and build upon the defendants' premises a vertical damp proof course; also to repoint the brickwork and construct a weather joint on the defendants' side.

A difference having arisen between the plaintiff as building owner and the defendants as adjoining owners, each party

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appointed a surveyor; these two surveyors selected Sir Alexander Stenning to act as third surveyor: and the three surveyors awarded and determined that the party wall was not so far defective or out of repair as to necessitate any works being executed under a party structure notice, and ordered the plaintiff to pay the costs of the award.

The plaintiff appealed to the county court under s. 91, sub-s. 2, of the Act. The county court judge came to the conclusion that the party structure notice was bad on the ground that it amounted to a claim to rebuild the plaintiff's premises with modern improvements which were not in existence when the houses were built; he held that to give to the word "defective" in s. 88, sub-s. 1, of the Act the meaning of "non-effective" was to give it too wide a meaning and one which would involve alterations and additions which had only come to be considered desirable and necessary since the passing of the Act. The learned judge concluded with these words: "The view I take of the words 'defective or out of repair' is of a much more limited character, and in my judgment the work required in the notice to be done was not of such a character that it could be called 'making good or repairing.' In these circumstances I come to the conclusion that this party structure notice was bad, and that in consequence of the character of the work required to be done it was not a notice within the powers or provisions of the Act." He therefore gave judgment for the defendants.

The plaintiff appealed, and a Divisional Court (Phillimore and Bankes JJ.) held (1) that a wall which had become a party structure within the meaning of the Act, although originally built for other purposes and still sufficient for those purposes, might from dampness or other causes be as a party structure defective within the meaning of s. 88; they accordingly sent the case back to the county court judge.

When the matter came again before the county court judge, he found that a portion of the wall, taking the dampness as a test, was in fact defective. But upon going into the proposal made by the plaintiff for the rectification of the defect, he held that it was not a proper one under the terms of the Act, and, acting upon the

(1) [1911] 2 K. B. 265.

suggestion of Bankes J. (1) that it was open to him to go into the previous history of the wall, he considered a plan proposed by the defendants according to which the work was to be done on the plaintiff's side of the wall, and approved it, and rejected the plan of the plaintiff.

The plaintiff appealed to a Divisional Court (Bankes and Lush JJ.), who dismissed the appeal. In the course of his judgment Bankes J. said: "In my opinion the county court judge has a full discretion to say what in his opinion is just as between the contending parties with regard to the particular matter in dispute between them, which in this particular case is how the defect, which has now been found to exist, shall be remedied or made good. It is said he has taken into consideration matters which he ought not to have taken into consideration at all as a matter of law, and it is said that certain observations which I made use of in giving my decision when this case was before this Court previously (1) were wrong. What I said then was this: 'It was open to them' (that is to say, the surveyors or the county court) 'to say that, having regard to the previous history of the wall, no work should be done on the adjoining owners' side, if it could be done on the side of the building owner,' and later on I said, 'and then to order such steps to be taken as they thought necessary and proper having regard to the previous history of the wall, what has since happened, and its present condition.' In spite of the criticism which has been offered to those observations, in my opinion they are right, and I do think that in coming to a conclusion as to what work ought to be done in order to remedy a defect existing in part of the wall the surveyors or the learned county court judge, have a right to consider what I called in my earlier decision 'the previous history of the wall.' When it is a question as between the adjoining owners of a party wall on which side of the wall the work is to be done, which must necessarily cause a certain inconvenience to the party on whose side the work is to be carried out, in my opinion it is right for the persons who have to decide that matter to take into consideration what I have called the previous history of the wall, and to decide

(1) [1911] 2 K. B. at p. 270.

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on which side the necessary works are to be carried out in order to remedy the defect or want of repair complained of."

The plaintiff appealed, by leave of the Court of Appeal.

Sir C. A. Cripps, K.C., and *Hudson, K.C.* (*Cecil Walsh* with them), for the appellant. The county court judge went wrong on two points. First, he acted upon the suggestion thrown out by Bankes J. when the case came before the Divisional Court at an earlier stage (1), and took into consideration the previous history of the wall in question for the purpose of determining whether the mode of remedying the defect in the wall proposed by the building owner was a proper one. It is contended that he was wrong in doing this. Secondly, he exercised his jurisdiction erroneously by directing that a mode of remedying the defect other than that proposed by the building owner should be adopted. Under the provisions of the London Building Act, 1894, applicable to the present case it is not competent to the surveyors who are appointed arbitrators, or the county court judge on appeal from them, to take into consideration the previous history of the wall, or the circumstances under which the wall came to be a party wall, as between the parties or their predecessors in title. All they have under the circumstances to consider is whether, taking things as they stand at present, the wall, being a party wall, is defective, and whether the mode of remedying the defect proposed by the building owner is a proper one, and, if so, subject to what conditions and restrictions for the protection of the adjoining owner it should be carried out. The previous history of the wall is quite immaterial to the questions which they have to decide. If the arbitrators, or the county court judge on appeal from them, come to the conclusion that the mode of remedying the defect proposed by the building owner is not a proper one, their only jurisdiction is to reject it, and then the building owner can start again and give a fresh notice putting forward some other scheme, but they cannot impose on the building owner a scheme other than that proposed by him. Here the county court judge has directed the adoption of a different scheme from that proposed.

(1) [1911] 2 K. B. 265, at p. 270

[FARWELL L.J. The Act does not appear to enable the county court judge to order the building owner to carry out any work for remedying the defect in the party wall. The effect of his order seems to be permissive merely.]

If that be so, the only point raised appears to be whether it was competent for him to take into consideration the previous history of the wall for the purpose of deciding whether the work proposed by the building owner was a proper mode of remedying the defect in the wall. [They cited *Standard Bank of British South America* v. *Stokes*. (1)]

Atkin, K.C., and *E. Church Bliss*, for the defendant Barry. The point that regard could not be had to the past history of the wall was not taken in the county court, and it is a condition precedent to the right to appeal to shew that it was so taken: *Smith* v. *Baker*. (2) In any event, it only amounted to misdirection or misreception of evidence, and there has been no miscarriage of justice: there should therefore be no new trial. The Divisional Court said that the history of the wall could be taken into consideration: there was no appeal from that decision, and the county court judge very properly accepted it and acted upon it. If the work could only be done with the maximum amount of inconvenience on the defendant's side of the wall, while on the plaintiff's side it could be done with the minimum amount of inconvenience, the county court judge was right in holding that it should be done on the plaintiff's side, and it is immaterial if he took into consideration something that he ought not to have done.

No reply was called for.

VAUGHAN WILLIAMS L.J. The only question we have to decide is whether there should be a new trial of this case. I am of opinion that the learned county court judge took into consideration matters which he ought not to have done: he obviously took into consideration the ancient history of this wall: there must therefore be a new trial. I need say no more: if I did, it might prejudice the new trial. I may say, however, that I cannot agree with the argument on behalf of the defendant that the

(1) (1878) 9 Ch. D. 68. (2) [1891] A. C. 325.

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only possibility is that, if the scheme as it stands is not workable, you must have a new and rival scheme and adopt that. It is plain, upon the language of the Act of Parliament, that the proper course is to allow the scheme, subject if necessary to modification.

FLETCHER MOULTON L.J. This appeal raises one point of general importance. The London Building Act, 1894, in this part of it, is legislation with the object of enabling party structures to be repaired and made good by persons of whose houses they form part. The rights given to the parties depend on the condition of the party wall and the arrangement of the premises on each side of it, but they relate to no question of behaviour in the past; they are determined entirely rebus sic stantibus, and are designed to remedy a present evil. That is plain from the language of the Act, and also from the fact that the tribunal to decide between the building owner and the adjoining owner is a tribunal of surveyors, with an appeal to the county court. In my opinion that tribunal has no right to inquire how the wall got into its present condition or how it had been used previously. They have to decide whether the scheme carries out the provisions of the Act, and whether it complies with the obligation of s. 90, sub-s. 3, that it shall cause no unnecessary inconvenience. It is clear that the learned county court judge thought that the questions for his decision were affected by the past history of the wall, by the fact that what was originally a garden wall had been adopted as a party wall, and what, according to my surmise, he thought was that the wall was one which had always had water in it, and that if the building owner wanted to prevent the water coming on to her premises she must carry out works on her own side of the wall which would prevent the water coming through into her premises. In my opinion he had no right to go into that consideration, and if a mode of repair by which water could be kept out by a damp proof course on the other side was a right in the building owner under s. 88 of the Act she could exercise that right. For these reasons, I think that the learned county court judge, rightly reading the directions contained in the judgment of the Divisional Court, allowed himself to be

influenced by these considerations, and that the only remedy is that the case should go back to him for a new trial.

FARWELL L.J. I am of the same opinion. I regret a third trial should be necessary, but I am bound to express my opinion, and the more so as the difficulty has arisen on certain expressions of opinion contained in the judgment of Bankes J.

There is no question that this wall is a party structure; there is no question that it is defective. The building owner having given the notice required by s. 90 stating the nature of the particular works proposed and the time at which it is proposed to commence them, exception has been taken to the mode in which she proposes to carry them out on the ground that it will cause unnecessary inconvenience to the adjoining owner, and that question has gone before the appointed tribunal. The learned county court judge has obviously founded his decision (and under the circumstances quite rightly) upon the opinion to which Bankes J. gave expression, and has taken into consideration the previous history of the wall. With all respect to Bankes J., I think that this was quite wrong and also very inconvenient. There is a right in the building owner to have a party structure put right. It cannot be said that the mere fact that he puts the Act into operation is enough to raise a sort of equity against him to prevent him from exercising the full rights given him by the statute; at all events it appears to me to be merely a question of fact in each case whether what is proposed to be done does or does not cause any unnecessary inconvenience. The conduct of the parties has nothing to do with it: it is a question of fact, and to go into evidence as to the past history of the wall (in the present case going back to 1872) is to put a very unnecessary burden of expense on the parties; and it is quite clear that the learned county court judge has founded his opinion upon such considerations, which are quite irrelevant. It follows that it is inevitable that there should be a new trial.

Appeal allowed. New trial ordered.

Solicitors for plaintiff: *Reid, Sharman & White.*

Solicitors for defendant Barry: *Hopgood & Dowsons.*

W. J. B.

1912
July 9.

THE KING *v.* THE REVISING BARRISTER FOR THE BOROUGH OF HANLEY.

THE KING *v.* THE TOWN CLERK OF STOKE-ON-TRENT.

Parliament—Registration—Lists of Voters—Omission to expunge Names successfully objected to—Omission through Inadvertence—Lists transmitted to Town Clerk—Register printed from Lists—Jurisdiction of Court to order Revising Barrister to correct Mistake—Lists destroyed—Mandamus—Parliamentary Voters Registration Act, 1843 (6 & 7 *Vict. c.* 18), *ss.* 41, 47, 48.

A revising barrister for a parliamentary borough, owing to an accident to his right hand, availed himself of clerical assistance to mark upon the lists of voters the results of his decisions as pronounced orally in Court. By some inadvertence the clerk omitted to strike off the lists the names of some persons who had been successfully objected to and whose names were ordered by the revising barrister to be expunged. The lists with those names remaining on were delivered by the revising barrister to the town clerk, and the names were accordingly printed in the register of electors for the borough. The mistake was not discovered until the expiration of some months after the register had come into operation. The original lists of voters which had been before the revising barrister were either lost or destroyed :—

Held, that the Court had jurisdiction to grant writs of mandamus to the revising barrister and to the town clerk to have the mistake corrected; that in the circumstances there need not be a previous demand and refusal to do the act sought to be enforced; and that the proper course was for the revising barrister to expunge the names on a copy of the register and to deliver the same to the town clerk, and for the town clerk to make the necessary corrections in the register.

Two rules nisi for writs of mandamus.

The first was a rule calling upon the barrister appointed to revise the lists of voters for the parliamentary borough of Hanley and the county borough of Stoke-on-Trent to shew cause why a writ of mandamus should not issue directed to him commanding him pursuant to the statutes in that behalf to deliver forthwith to the town clerk of the borough of Stoke-on-Trent the several lists of voters for the parishes of Hanley and Burslem (which were within the parliamentary borough of Hanley and the county borough of Stoke-on-Trent), with the several names of persons duly expunged which were ordered by him to be and were in fact expunged by him at the Courts held by him on September 22 and 29, 1911,

at Hanley, and on September 23 and October 3, 1911, at Burslem, which names were set out and contained in an exhibit to the affidavit of Philip George Crosby, and to sign his name to every page of the several lists so settled, on the ground that the said names were duly objected to and ordered to be and were in fact expunged by the revising barrister at the several Courts aforesaid, but such names in fact remained on the lists delivered by him to the town clerk.

The second was a rule calling upon the town clerk of the county borough of Stoke-on-Trent to shew cause why a writ of mandamus should not issue directed to him commanding him forthwith to cause the lists of voters for the several parishes of Hanley and Burslem, in the parliamentary borough of Hanley, upon receiving the same from the revising barrister appointed to revise the lists of voters for the parliamentary borough of Hanley and the county borough of Stoke-on-Trent, to be copied and printed in a book according to the statutes in that behalf, and forthwith to sign and deliver the same to the returning officer of the said borough to be by him and his successors as returning officers safely kept for the purpose required by the statute in that behalf (1), on the ground that the several names of persons contained and set out in an exhibit to the affidavit of Philip George Crosby were duly objected to and ordered to be and were in fact expunged by the revising barrister at the Courts held by him on September 22 and 29, 1911, at Hanley, and on September 23 and October 3 at Burslem, but such names in fact remained on the lists delivered by the revising barrister to the town clerk.

The rules were obtained at the instance of Philip George Crosby, and notice of the rules was ordered to be given to the returning officer of the parliamentary borough of Hanley, to the agent of each of the political parties in the borough, and to one of the persons whose names were ordered to be expunged.

It appeared from the affidavits filed in support of the rule that Crosby, who was on the list of parliamentary voters and burgesses

(1) The writ of mandamus to the town clerk as drawn up had these additional words here: "in substitution for the book signed and delivered by you to the returning officer of the same borough on or before the last day of December, 1911."

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for the parish of Hanley, in the county borough of Stoke-on-Trent, duly objected to the names of 367 persons being retained on Division I. of the lists of voters for the parish of Burslem, and to the names of 710 persons being retained on Division I. of the lists of voters for the parish of Hanley, both parishes being in the parliamentary borough of Hanley. A list of the persons so objected to was duly printed and published by the overseers. At the hearing the revising barrister, owing to an accident to his right shoulder which prevented him using his right hand, had to avail himself of clerical assistance in striking off the names of such voters as were successfully objected to, the names so ordered to be struck off being duly read out in open Court. At the conclusion of the revision the revising barrister handed to the town clerk or his deputy what appeared to be the revised lists of voters for the parishes of Burslem and Hanley, and the said lists were duly copied and printed in a book, which was the register of electors for the parliamentary borough of Hanley. The register as printed contained the names of 316 persons in Division I. who were duly objected to as aforesaid and ordered by the revising barrister to be struck off the lists. (1) The names of the persons so ordered to be struck off were set out in an exhibit to one of the affidavits. The lists which were before the revising barrister at the revision Court and which were handed by him to the town clerk could not be found, though search was made for them. The rules were moved for on July 2, 1912. (2)

The following letter was written to the Court by the revising barrister:—

"I venture to state for your Lordships' information my recollection of what occurred during the revision of the Hanley parliamentary borough voters' lists. I unfortunately met with an

(1) It did not appear whether the mistake in printing in the register the names of those persons who had been successfully objected to and ordered by the revising barrister to be struck off the lists occurred owing to the clerk who was assisting the revising barrister omitting to strike the names off the lists as directed by the revising barrister or from some other cause, but the Court, as will be seen from the judgment, assumed that it arose from the mistake of the clerk.

(2) It appeared that when the rules were moved there was impending a parliamentary election for the borough of Hanley.

accident to my right shoulder, and lost the use of my right hand. I had therefore to avail myself of clerical assistance in striking off the names of such voters as were successfully objected to.

"I was handed the lists of voters and directed my assistants to strike out the voters' names as each objection was made and sustained; and at the end of the revision I signed the lists and handed them to the town clerk or his deputy.

"I was afterwards handed duplicate lists by the town clerk's deputy, and on being informed that these were correct, I signed them also, and returned them to the town clerk or his deputy.

"I regret that I cannot give your Lordships any further information, but I may perhaps add that before completing the Hanley revision I revised the voters' lists at Burslem, which is part of the Hanley parliamentary borough. I revised these in the same way as the Hanley lists, and I understand that no mistakes were found in them. (1)

"I desire to submit to any order which the Court may think fit to make against me."

Roskill, K.C. (*Hugh Fraser* with him) shewed cause. (2) A mandamus will not be granted as there has been no previous demand and refusal to do the act in question: *Reg.* v. *Mayor, &c. of Eadnia* (3); and that is so even where the time has passed within which the act can be done.

[CHANNELL J. Can that rule apply in a case where the revising barrister could not do the act without an order of the Court? The demand to do the act would be futile. No demand was made upon him to do the act during the period when he could have done it, because the mistake was not then discovered.]

Next, the register came into operation on January 1, 1912, and the mistake might have been discovered then or soon afterwards, and the rules were not moved for until July 2, 1912. It is a well

(1) It subsequently appeared that when the revising barrister revised the lists for the parish of Burslem in obedience to the writ of mandamus there was only one name which he had ordered to be expunged at the original revision before him and which by inadvertence had not been expunged.

(2) Counsel both for and against the rules appeared on behalf of the political party agents.

(3) [1892] 2 Q. B. 21.

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recognized rule that a person who asks for a mandamus must apply promptly. There has been an unreasonable delay here, and the Court upon this ground alone will refuse the mandamus.

Further, the revising barrister has not declined to exercise his judicial discretion in revising the lists of voters, and therefore a mandamus will not lie. He has not refused to perform his public duty as required by law. However the mistake in allowing the names to appear in the register arose, it did not arise through any refusal to exercise jurisdiction. In *Mayor of Rochester* v. *Reg.* (1) and *Reg.* v. *Mayor of Monmouth* (2) the mayor and assessors refused to hear the objections to the names of certain persons being retained on the burgess list. There was in those cases a refusal to exercise jurisdiction. This Court has no general jurisdiction to interfere with the lists of voters and to correct a mistake made by the revising barrister therein: *In re Allen.* (3)

[DARLING J. That case related to the jurisdiction of the Court of Common Pleas upon appeals from revising barristers. It does not deal with the jurisdiction of the old Court of King's Bench to grant a mandamus.]

There is no power in any Court, except upon an appeal, to direct the lists of voters to be altered. The jurisdiction is statutory. In *In re Town Clerk of Eastbourne, Ex parte Keay* (4) a mandamus to the town clerk of Eastbourne to remove certain names to the proper ward roll which had been placed in the wrong ward rolls by mistake was refused. Wright J. no doubt suggested that possibly a mandamus might lie to the revising barrister to correct the lists, but that was only a dictum. In Rogers on Registration, 17th ed., pp. 363, 364, two unreported cases are cited, in one of which, *Ex parte Mayor of Wednesbury*, Day J. by consent of all parties gave leave to amend the burgess roll on proof that the names had been entered therein by mistake; and in the other, *Rex* v. *Raven*, Bray J., on proof that a name which stood on the revised burgess list signed by the revising barrister had been omitted from the printed burgess roll, ordered a mandamus to issue, after the revision had

(1) (1858) E. B. & E. 1024.
(2) (1870) L. R. 5 Q. B. 251.
(3) (1859) 6 C. B. (N.S.) 334.
(4) (1891) 66 L. T. 323.

been completed, to the revising barrister to inquire into the circumstances and to correct the list, and this was accordingly done on October 11. Those cases, however, are not authorities in point, because in the first case the order is stated to have been made by consent, and in the other it does not appear that the order was made otherwise than by consent. The mistake in the present case probably arose from the omission to do the mechanical act of striking the names successfully objected to off the lists of voters. The Court cannot now correct that mistake. By s. 79 of the Parliamentary Voters Registration Act, 1843, the register is made conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register. In the *Pembroke Boroughs Case* (1) Channell J. said that "the policy of the Legislature has . . . . been to make it necessary to raise all questions as to rights to vote in the registration Court, and to do this by preventing their being raised at any other time or in any other manner"; and both Darling J. and Channell J. referred to the case of *Stone* v. *Jolliffe* (2), which decided that the register was conclusive on every tribunal which has to inquire into elections except in the case of a person prohibited from voting by statute or at common law. There has been no case where a mandamus has been granted in the case of a parliamentary list of voters. The fact that the lists which the revising barrister revised are not forthcoming is a fatal objection to the issue of a writ of mandamus, as the revising barrister cannot make a return to it, and the town clerk can only return that he did everything which the law required him to do. The rules ought therefore to be discharged.

Dickens, K.C. (*W. Mackenzie* and *F. W. Sherwood* with him), in support of the rules. The Court has power to order the revising barrister to correct the mistake. The *Pembroke Boroughs Case* (3) only decided that upon an election petition praying a recount and scrutiny the election petition Court would not go behind the register. In the present case the revising barrister has not performed the statutory duty imposed upon him of

(1) (1901) 5 O'M. & H. 135, at p. 144.

(2) (1874) L. R. 9 C. P. 734.

(3) 5 O'M. & H. 135.

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delivering to the town clerk the lists of voters with the names of those persons who were successfully objected to expunged, each erasure being initialled and each page signed. The lists as revised were never delivered to the town clerk at all. In *In re Allen* (1) the revising barrister in the course of carrying out his duty made a mistake in the performance of it. In the present case the revising barrister did not carry out his statutory duty. Moreover, that case came before the Court of Common Pleas, and no question of a mandamus arose. It did not deal with the jurisdiction of the Court of Queen's Bench to grant a mandamus. It is said that there must be a demand and refusal. There could have been no demand and refusal in this case, because it was not discovered until after the statutory period within which the revising barrister could have corrected the mistake had expired. A demand and refusal would therefore have been useless. The duties of the revising barrister are set out in the Parliamentary Voters Registration Act, 1843. By ss. 34 and 35 the clerk of the county council or the town clerk, as the case may be, has to deliver to the revising barrister the lists of voters and the lists of persons objected to, and by s. 41 the revising barrister has to write his initials against the names expunged from or inserted in the lists, after having, as required by 28 & 29 Vict. c. 36, s. 15, read out in Court the names so expunged or inserted, and then he has to sign each page of the lists. By s. 47 the lists of voters for a county so signed are to be sent by the revising barrister to the clerk of the county council, who is to keep them among the records of the sessions, and the clerk of the county council must then cause the lists to be copied and printed in a book, called the register, and this book is to be signed by him and delivered to the sheriff of the county ; and by s. 48 the lists of voters for a borough shall be delivered by the revising barrister to the town clerk, who shall, as in the case of county lists, cause them to be copied and printed in a book which he is to sign and deliver to the returning officer of the borough. The revising barrister did not deliver the lists to the town clerk with the names duly expunged. Then s. 79 provides that the register "so made as aforesaid," that is to say, made from the lists

(1) 6 C. B. (N.S.) 334.

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as revised by the revising barrister, shall be conclusive evidence of the qualifications of the persons therein named; and s. 32 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), provides that the register "made up from revised lists under the Parliamentary Registration Acts and this Act of voters for any parliamentary borough" shall come into operation on the first day of January next after the revision. The prosecutor only desires to have the register made up from the lists as revised. The register is not so made up; it is made up partly from the revised lists and partly from the lists which by mistake were not in accordance with those as revised by the revising barrister. There is no practical difficulty in having the mistake set right, because it is not denied that those 316 names were in fact ordered to be struck off by the revising barrister. The revising barrister can deliver a list to the town clerk with the names struck off, and the town clerk will then correct the register accordingly. The rules should therefore be made absolute.

DARLING J. These are two rules for a mandamus, one to the revising barrister who revised the lists for the parliamentary borough of Hanley, and the other to the town clerk of the county borough of Stoke-on-Trent, the object of the rules being to obtain as the register of electors for the parliamentary borough the lists of voters as they were in fact revised by the revising barrister. It is objected that the application for a mandamus ought to have been made promptly, and that it is now too late to make it. That is a matter for the discretion of the Court, and in the circumstances of this case we think that the public interest requires that that objection should not be allowed to prevail. There has been no wilful delay in making the application; it was made as soon as the mistake was discovered and as soon as the necessity for the application arose. It cannot be successfully suggested that the rule cannot be directed to the revising barrister, because he is no longer a revising barrister, having ceased to be such on October 12, 1911, and therefore has no statutory power to do what is required. In *Keat* v. *Furnell*, No. 2 (1), the Court of Appeal directed the revising barrister to

(1) [1908] 2 K. B. 933.

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complete the revision of the voters' lists long after his statutory jurisdiction had expired. I am satisfied that we have power to order the revising barrister to make the lists in conformity with those which he adjudicated upon and revised, and which as so revised he was under a statutory obligation to deliver to the town clerk. It is next said that the Court will not grant a mandamus because there has been no demand upon and refusal by the revising barrister to do what he is now called upon to do. It would be futile to make a demand upon the revising barrister to do that which he has no power to do except under an order of the Court, for the mere purpose of obtaining his refusal to do that which he is willing to do if so ordered and which in fact he did in the exercise of his judicial discretion when he originally revised the lists. The reason why the lists as so revised were not printed in the register in the form in which the revising barrister intended that they should be is not really in dispute. As the result of an accident the revising barrister was unable to use his right hand and could not conveniently write. Therefore, after allowing an objection and reading out in open Court what his decision was, he made use, as he was entitled to do, of clerical assistance for marking upon the lists of voters the result of his decision. It may be, though it is not certain, that the clerk who assisted him omitted to strike out the names which the revising barrister decided should be struck out. I infer from his letter that the revising barrister is content to assume, as he does not know the contrary, that the mistake arose in this way. I will assume that the true explanation is that the clerk omitted to strike the names off the lists which were before the revising barrister. The revising barrister, by means of a stamp, initialled the alterations which had been made in the lists and signed each page. He has fully explained to us in his letter what took place. He says that he was handed the lists of voters and that he directed his assistant to strike out the voters' names as each objection was made and sustained, and at the end of the revision he signed the lists and handed them to the town clerk or his deputy. He signed them assuming that every alteration which he directed to be made had been made. The town clerk then printed the register from those lists which

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he received from the revising barrister and which have now been lost or destroyed.

Now the fact that the register is not that which the revising barrister intended it to be is the result of inadvertence. In my opinion the authorities which have been cited to us shew that, where there has been such inadvertence, the Court can order a writ of mandamus to issue to set the matter right, and that power is not limited to a case where there has been a demand and refusal to do that which the person against whom the mandamus is asked ought to have done. The revising barrister thought that he had expunged the names, but by some one's inadvertence he did not do so, and a mandamus can issue to him to do it. The decision in *In re Town Clerk of Eastbourne, Ex parte Keay* (1) supports the view we are now taking. In that case there was an application for a mandamus to the town clerk to make an alteration in the burgess roll. By some mistake of the overseers the names of certain persons appeared in the wrong ward rolls, and the mistake was not discovered until after the burgess lists had been published. A. L. Smith J. said: "This is an application for a mandamus to compel the town clerk to do his duty according to law: but he has done all he can do in accordance with the law. It was his duty to make out the burgess roll in accordance with the revising barrister's directions, and he has done so." It is clear that in that case a mandamus could not issue to the town clerk, as he had performed his duty. Wright J. said: "It is conceivable, on the principle of the *Rochester* case (2), that a mandamus might lie against the revising barrister." The case of *Mayor of Rochester* v. *Reg.* (2) seems to me to shew clearly what we ought to do in the present case. In that case Martin B., in delivering the judgment of the Lord Chief Baron and himself, after saying (at p. 1081) that the principle of the cases of *Rex* v. *Sparrow* (3) and *Rex* v. *Mayor, &c., of Norwich* (4) established the doctrine that the Court of Queen's Bench ought to compel the performance of a public duty by public officers although the time prescribed by statute for the performance of it had passed, said (at p. 1032): "We agree with the opinion of Lord Ellenborough,

(1) 66 L. T. 323.
(2) E. B. & E. 1024.
(3) (1740) 2 Str. 1123.
(4) (1830) 1 B. & Ad. 310.

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as expressed on a subject somewhat similar in *Rex* v. *The Justices of Denbighshire* (1), that common sense requires that, if the burgess list of a borough be not properly revised at the proper time, it should be done afterwards. But, were there no authority upon the subject, we should be prepared upon principle to affirm the judgment of the Court of Queen's Bench. That Court has power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute: Comyn's Digest, Mandamus (A)." In the present case the prosecutor has no specific remedy which he could have availed himself of, and he now asks this Court to interfere by mandamus upon the ground stated by Martin B. The learned judge proceeded: "This is the purpose for which the writ has been used in the present instance; and, were there not this remedy, it would be in the power of the mayor and assessors, from mistake, or ignorance, or corruption, to disfranchise any borough, or to outnumber the lawful burgesses, by placing upon the burgess roll any number of persons having no legal right to the franchise. It was said that the mayor and assessors were subject to an indictment for a corrupt exercise of their authority. This no doubt is true; but the judgment on the indictment, though it may punish the guilt, cannot redress the wrong; and such a proceeding is wholly inapplicable to a case of error in judgment or mistake in fact." In the present case the revising barrister thought that he was handing to the town clerk the lists as he had revised them. That was a mistake in fact, and it created a wrong because a number of names of persons were allowed to remain on the lists of voters and thus to be printed in the register when they ought not to have been there. A wrong was thereby done to those who were rightly on the register, as their votes might to that extent be neutralized. Martin B. further said: "In our opinion, the want of such remedy would be inconvenient to the subject and injurious to the community. Members of municipal corporations would be deprived of their rights; and

(1) (1803) 4 East, 142.

the public would lose the advantages to create and secure which those rights were conferred. Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable." The present is a case in which there is every reason for applying this constitutional remedy by mandamus. The register will thereby be brought into accord with the lists which the revising barrister revised and which he thought he had handed to the town clerk. There is therefore sufficient reason for ordering the mandamus to issue.

It is further objected that there is nothing in existence to which the mandamus can apply, and that therefore the Court ought not to order it to issue. It seems to me that the mandamus will in effect direct the revising barrister to deliver to the town clerk a correct copy of the lists as he revised them. The actual lists which he revised and delivered to the town clerk have been lost or destroyed and so he cannot make the necessary corrections in those lists. But the register is copied from the lists which the town clerk received from the revising barrister. It differs from the lists as the revising barrister revised them, and he will know in what way it differs. He will therefore make the necessary corrections on a copy of the register and deliver it to the town clerk, who will correct the register accordingly. The register so corrected will then become the register of electors for the borough.

The rules must be made absolute.

CHANNELL J. I am of the same opinion, and I agree with the reasons given by my brother, but as the case is one of some peculiarity I desire to express in my own language the reasons which have led me to that conclusion.

The affidavits clearly establish that a mistake has been made by reason of which 316 names of persons whom the revising barrister judicially decided should be struck off the lists of voters have somehow or other been printed in the register of electors. It does not appear to be denied that the revising barrister decided that these names should be struck off. That

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must be so, because the Court directed that notice of the rules should be given to the agent of each of the political parties in the borough, and they have appeared here by counsel, and they do not deny it.

By some mistake, therefore, 316 names now appear in the register which ought not to be there. The affidavits are not clear as to how the mistake occurred. It may have been the mistake of the revising barrister or of the clerk who was assisting him, and for whose act or omission the revising barrister was responsible, and if it was the clerk's mistake it must be taken to be the mistake of the revising barrister. It is conceivable that it may have been the mistake of the town clerk or the printer. Unfortunately the lists as revised are not forthcoming, and so we can get no assistance from them in clearing up that doubt. At first I thought that that was somewhat strange, but it appears that, though there is an express statutory direction in the case of a county that the lists shall be kept, there is no such express direction in the case of a parliamentary borough, and therefore a practice may have arisen of destroying them as soon as the register is printed. The fact that the lists are not forthcoming prevents us from being quite certain as to how the mistake arose, but we are not entitled without clear evidence to attribute to a public official that he has omitted to do his duty, and we cannot assume that the town clerk has in some way inserted in the register these 316 names if they were not left in the lists as delivered to him by the revising barrister. As I gather from the revising barrister's letter, he admits very properly that the mistake may have been that of the clerk who was assisting him. The inference therefore which I draw is that the mistake was in fact that of the clerk. The revising barrister, when dealing with the objections to the lists of voters, was using the printed list of objections, which is a mere cause list, disposing of the objections as they appeared on that list. In the ordinary course he would with his own hand have struck off the lists of voters the names of the persons successfully objected to. Owing to an accident to his arm he was unable to do this himself, and he had a clerk to assist him. Apparently the clerk omitted to do it in the cases under discussion. That is most likely what happened, and

for the purposes of my judgment I assume it was so. There was therefore an omission by the revising barrister to do that which he ought to have done, namely, to expunge the names from the lists, and to deliver the lists with the names expunged to the town clerk. Owing to inadvertence that was not done. The town clerk did nothing wrong, because I assume that he printed the lists as received by him from the revising barrister. The mistake therefore arose in not delivering to the town clerk lists of voters as actually revised by the revising barrister in accordance with his judgments pronounced orally.

Those being the facts which I assume, a question of some difficulty arises as to whether that mistake can be set right. In my opinion it can, under a doctrine of this Court, which is an extremely useful one, and which was established by a majority of the judges in the Court of Exchequer Chamber in *Mayor of Rochester* v. *Reg.* (1) The principle laid down in that case is well established and has to my knowledge been acted upon frequently. The principle is that a mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed: and if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and been succeeded by another person, the writ may be directed to the successor, and it is his duty to obey it: and where there is no successor, but the person who ought to have performed the duty has become functus officio, the latter may be ordered to perform it, though the time within which he could of his own motion have performed it has passed. It is a most useful jurisdiction which enables this Court to set right mistakes. That principle, it seems to me, is applicable to the present case, and it is applicable not only to the non-performance of duties which the person who ought to have performed them has refused upon demand to perform, but also to cases where the non-performance arises from mere inadvertence, where he cannot have had his attention directed to the matter and cannot have refused upon demand to perform them. The requirement that before the Court will issue a mandamus there must be a demand to perform

(1) E. B. & E. 1024.

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the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable in all possible cases. Obviously it cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time within which he can do it has passed.

In the present case the revising barrister has performed the judicial part of his duty. If he had merely made some error in the performance of that part of his duty, a mandamus would not lie to correct him. But having performed the judicial part of his duty, he omitted by inadvertence to perform the mechanical part of it, namely, to deliver to the town clerk the lists of voters as revised by him. If the mistake had been discovered in time and the revising barrister's attention had been called to it, he would have corrected it, and would have had jurisdiction to do so. It is that act which he ought to have done and which would have been done but for inadvertence which we can now order him to do. Therefore so far as the revising barrister is concerned the mandamus must issue. The proper course in ordinary circumstances would be for him to make the alterations in the original lists of voters which were before him at the revision Court. That cannot be done because those lists cannot be found. A difficulty, however, of that kind does not prevent the Court from doing what it thinks right in order to correct the mistake. The lists do not exist, but a copy of them is in existence upon the assumption on which we are dealing with this case, namely, that the town clerk in printing the register printed a correct copy of the lists which the revising barrister delivered to him. Therefore the revising barrister can now erase the 316 names from the copy of the lists. I do not say what the exact form of the mandamus should be, but the revising barrister will make on a copy of the register the alterations which he ought to have made on the original lists by striking off the 316 names.

There remains the question as to what the town clerk ought to do to complete the matter. The town clerk, as I have said, has done nothing wrong. The case of *In re Town Clerk of Eastbourne, Ex parte Keay* (1) is an authority that he has done his duty. So far as he alone is concerned we should not grant a

(1) 66 L. T. 323.

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mandamus against him. But, upon the revising barrister making the alterations in his copy of the register, that copy so altered is substituted for the lists which the revising barrister delivered to the town clerk. Therefore the copy which the town clerk made of the lists delivered to him by the revising barrister and which is embodied in the present register will then become an incorrect copy of the lists as finally revised by the revising barrister, and accordingly the mandamus must issue to the town clerk to make his copies correct. He will make in his copies of the register the necessary alterations, with the result that by the two officers performing the duties which we impose upon them by these two writs the mistake will be set right. The register as corrected will then become the register of electors for the borough.

The rules must be made absolute.

Rules absolute.

Solicitors for prosecutor: *Gibson & Welden.*

Solicitors shewing cause: *Russell-Cooke & Co.*

W. F. E.

[IN THE COURT OF APPEAL.]

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June 10, 11: *July* 18.

CAVE AND ANOTHER *v.* HORSELL.

Landlord and Tenant—Lease—Lessor's Covenant—Covenant not to let "any of the adjoining shops" for certain specified Purpose—Meaning of "adjoining."

The defendant, being the owner of certain house property, which included five shops, numbered 2 to 6, Limes Parade, let to the plaintiffs the shop No. 4, Limes Parade for twenty-one years, the lessor covenanting that he would not at any time during the continuance of the lease let "any of the adjoining shops belonging to me on the Limes estate," for the purpose of the businesses of upholsterers, cabinet makers, furniture dealers, or French polishers. Subsequently, during the continuance of the lease, the defendant let to a tenant the shop No. 6, Limes Parade for a term of twenty-one years for the purpose of carrying on the business (inter alia) of a cabinet maker:—

Held by Fletcher Moulton L.J. and Buckley L.J. (Vaughan Williams L.J. dissenting), that the word "adjoining" was not confined to the two shops physically in contact with the demised shop, but that it extended to No. 6, and that there had therefore been a breach

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of the defendant's covenant in respect of which the plaintiffs were entitled to recover damages.

APPEAL from a decision of Phillimore J. sitting without a jury. (1)

The defendant was the owner of certain house property at Weybridge, known as the Limes estate, which included five shops in Limes Parade, being Nos. 2 to 6. By a lease dated March 18, 1910, the defendant let to the plaintiffs the shop No. 4, Limes Parade for the term of twenty-one years, the lessees covenanting not to use the premises for any business "except those of upholsterers, cabinet makers, furniture dealers, and French polishers," and the lessor covenanting that he would not at any time during the continuance of the lease let "any of the adjoining shops belonging to him on the Limes estate" for the purpose of the businesses of upholsterers, cabinet makers, furniture dealers, or French polishers.

By a lease dated June 8, 1911, the defendant let to one Frederick Godden the shop No. 6, Limes Parade for a term of twenty-one years, the lessee covenanting that he would not use the premises for any business "except that of a cabinet maker, restorer of antiques, and dealer in works of art."

The action was brought to recover damages for breach of the defendant's covenant with the plaintiffs.

Phillimore J. held that there had been a breach of the defendant's covenant, and gave judgment for the plaintiffs for 150*l.* damages.

The defendant appealed.

Clavell Salter, K.C., and *W. H. Moresby*, for the defendant. The natural meaning of the word "adjoining" is "physically touching"; and the authorities shew that this is its legal meaning, unless the context makes it absolutely clear that the word is used in a looser sense. A restrictive covenant of this kind should be construed strictly, and it is very important that in documents such as conveyances and leases words such as "adjoining" should have a defined legal meaning, even if, occasionally, to give them

(1) See [1912] W. N. 19.

that meaning may defeat to some extent what may be conjectured to be the actual intention of the parties. The well-settled rule of construction is that a word should receive its natural meaning, unless absurdity, repugnance, or inconsistency is thereby produced. No absurdity, repugnance, or inconsistency will be produced in the present case by giving the word "adjoining" its natural meaning, though it may be conjectured that possibly the protection against competition will be thereby rendered somewhat less than was actually contemplated by one of the parties. [They cited *Vale & Sons* v. *Moorgate Street and Broad Street Buildings, Ld.* (1); *Rex* v. *Hodges* (2); *Ind, Coope & Co.* v. *Hamblin* (3); *White* v. *Harrow* (4); *Haynes* v. *King* (5); *Corporation of Wellington* v. *Corporation of Lower Hutt* (6); *Josh* v. *Josh.* (7)]

John Sankey, K.C., and Merlin, for the plaintiffs. The word "adjoining" in ordinary and legal English is susceptible of two meanings (see Oxford English Dictionary), and one must look to the circumstances of the particular case in order to see which of the meanings is applicable. In *Lightbound* v. *Higher Bebington Local Board* (8), which dealt with the meaning of the word "adjoin" in the Public Health Act, 1875, the language of Bowen L.J. is strongly in favour of the contention of the present plaintiffs; he says, "In construing such words as 'front,' 'abut' and 'adjoin' in this Act of Parliament, actual contiguity is not necessary in order that the terms should be fulfilled. The case of *Wakefield Local Board* v. *Lee* (9) shews that." The meaning of the word depends upon its setting, which is largely a question of fact. In *Coventry* v. *London, Brighton and South Coast Ry. Co.* (10) the phrase used was "immediately adjoining"; but what was the use of inserting the word "immediately" in an Act of Parliament if "adjoin" ex vi termini means "immediately adjoin"? Looking at the facts of the present case, they were dealing with a row of six houses in a terrace and under one roof; and it must be remarked that the covenant is not to let "any"

(1) (1899) 80 L. T. 487.
(2) (1829) 1 Moo. & M. 341.
(3) (1900) 81 L. T. 779; 84 L. T. 168.
(4) (1902) 86 L. T. 4.
(5) [1893] 3 Ch. 439.
(6) [1904] A. C. 773.
(7) (1858) 5 C. B. (N.S.) 454.
(8) (1886) 16 Q. B. D. 577.
(9) (1876) 1 Ex. D. 336.
(10) (1867) L. R. 5 Eq. 104.

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of the adjoining shops; the word "any" is most important; had the defendant's contention been correct, one would have expected the word "either" to have been used. We are not here to decide the meaning of "adjoining" naked and alone, but its meaning in collocation.

Clavell Salter, K.C., in reply.

Cur. adv. vult.

July 18. VAUGHAN WILLIAMS L.J. read the following judgment:—In the course of the argument of this case nobody questioned the correctness of the proposition laid down by Bowen L.J. in his judgment in *Lightbound* v. *Higher Bebington Local Board* (1), that "in construing the words of an Act of Parliament you must look at the subject-matter of the section and see what is the scope and object"; but I did not hear on the argument of the case anything to displace the proposition that "the terms of every document must, in the absence of all parol testimony, be construed in their primary sense unless the context evidently points out that in the particular instance and in order to effectuate the immediate intention of the parties they must be understood in some other or peculiar sense." I quote this passage from Taylor on Evidence, who quotes as his first authority the judgment of Lord Ellenborough in *Robertson* v. *French*. (2) Lord Ellenborough does not use the word "primary"; he speaks of "plain, ordinary and popular sense."

In *Mallan* v. *May* (3) Pollock C.B. says: "We must apply the ordinary rule of construction to this instrument; and though, by so doing, we may, in some instances, probably in this, defeat the real intention of the parties, such a course tends to establish a greater degree of certainty in the administration of the law. One of these rules is, that words are to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect." Parke B. and Rolfe B. were present and approved this decision

(1) 16 Q. B. D. 577.
(2) (1803) 4 East, 130, at pp. 135, 136.
(3) (1844) 13 M. & W. 511, 517.

and, I take it, the justification of it, i.e., that this rule, although the application of it may occasionally defeat the real intention of the parties, yet is justifiable, since such a course tends to establish a greater degree of certainty in the administration of the law. *Grey* v. *Pearson* (1) affirms the same rule. The passage from the judgment of Lord Wensleydale which was cited to us in argument says that "the grammatical and ordinary sense of words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther." Lord Wensleydale in the case of *Grey* v. *Pearson* (1) says, "I have been long and deeply impressed with the wisdom of the rule," and adds, "as it applies in construing wills and indeed statutes and all written instruments." For my own part I think the rule applies a fortiori to a case where the words of the contract have been approved by the parties thereto. The rule laid down by Bowen L.J. does not nullify the rule established by the two cases which I have just cited.

The words or, as some cases have it, the terms of the instrument in writing must in the first instance be construed in their natural or primary sense; then if, construed in that sense, the words seem inconsistent with the context of the instrument and the manifest intention of the parties, the words may be construed in a sense inconsistent with their strict and primary acceptation. I recognize that some words are so dependent for their meaning upon the context that they cannot be said to have only one strict and primary meaning, like the word "then," as to which Lord Wensleydale in *Abbott* v. *Middleton* and *Ricketts* v. *Carpenter* (2) says: "The word 'then' has more meanings than one. It may mean 'at that time,' or 'in that case,' or 'in consequence,' those being three of the meanings attributed to it in Johnson's Dictionary. Any one of these meanings may be given to it in its ordinary acceptation, and we may construe it as synonymous with 'in that case' or 'in consequence of that,' instead of requiring capital to be divided at that time,

(1) (1857) 6 H. L. C. 61, at p. 106. (2) (1858) 7 H. L. C. 68, 119.

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which would deprive the wife of her life estate. That ought not to be defeated, unless the words clearly require it."

The word "adjoining" in the present case is not a word which in its ordinary acceptation has more than one meaning, and that meaning is that it in fact adjoins or is contiguous to, in the ordinary acceptation of that word. The fact that a word is not infrequently misused does not alter either its strict and primary acceptation, or its grammatical and ordinary sense, or its ordinary acceptation, which are words intended in my opinion to express the same idea. Thus, in the present case, to give to the word "adjoining" the meaning "in the neighbourhood of" or "near to" is utterly inconsistent with the strict and primary acceptation of the word, in whatever form of words you express that idea.

The question which, according to my view, we have to answer is, "Is an intention inconsistent with giving to the words 'adjoining houses' their strict and primary acceptation so plainly declared or disclosed by this contract taken as a whole as to justify the Court in reading 'adjoining houses' as meaning any of the six houses in the said terrace?" It is a difficult question. I think that the intention of both parties to the contract that this covenant entered into by the lessor should operate to protect the lessee from competition in respect of his particular trade is plain, but that it is by no means plain that the protection described by the words "adjoining houses" was intended to go beyond the strict and ordinary user of those words, inadequate though the protection from competition thereby may be.

Phillimore J., in a judgment which is not founded upon the use of the word "any," which would be appropriate if all the six neighbouring houses were intended to be included, instead of the word "either," which would be appropriate if only the two adjoining houses were intended, says this at the conclusion of his judgment: "I now come back to the document itself, and looking at it and not giving an unnecessary meaning to any one single word, but taking all the words in their collocation and looking at all the circumstances of the case, I think I should be doing a grave injustice if I were to say that the meaning of the

covenant was that the landlords could let their houses to rivals of the plaintiffs so long as they refrained from allowing them in either of the two shops immediately adjoining that occupied by the plaintiffs. I think the word 'adjoining' is quite enough to cover these houses in Limes Terrace, and that any one of them is an adjoining shop within the meaning of this covenant. I am therefore of opinion that this action should succeed."

I have grave doubt whether the inadequacy of the protection is a sufficient ground for refusing to give the word "adjoining" its ordinary meaning. I think it is of great importance to adhere to the ordinary meaning of words employed in an agreement inter partes.

Lord Alverstone C.J., in delivering the judgment in *Ind, Coope & Co.* v. *Hamblin* (1), refused to accept the argument of Mr. Astbury and Mr. Stewart Smith that the object of the covenant must be considered when construing it, which was to ensure privacy and to prevent the defendant obtaining any right of light. "'Adjoining' here means 'substantially adjoining.' It does not mean contiguous." He said, "In my opinion the houses complained of do not 'adjoin' the plaintiff's property within the meaning of this covenant. The words must be construed in their ordinary sense, and not as meaning 'near to' the plaintiff's property."

The other members of the Court concurred. I think this case binds us. The Court treated the word "adjoining" as a word having an "ordinary sense" and not as a word meaning in its ordinary sense either "near to" or "substantially adjoining." It is a word constantly used in leases and dealings with land, and in my opinion it is of the utmost importance that the word "adjoining" in this respect should have a fixed and settled meaning and not be treated as a word of flexible meaning, and while I do not say that a context in a contract may not demonstrate an intention to use the word "adjoining" in a lease in other than its ordinary sense, I do not think that such a departure from the ordinary sense can be supported upon the ground that the protection of the tenant would have been more

(1) 84 L. T. 168.

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efficient if the word "adjoin" was read *not* to have its ordinary meaning and construed as meaning "near to."

I understand that my brothers differ from my conclusion, and their views will of course prevail, but I have thought it right to express my view because I think it important that the word "adjoin," so often used in respect of houses and land, selected by the parties to the document, should be construed in its ordinary and grammatical sense, and that it is not sufficient to say that to give a wider construction would in this case have given more efficient protection.

FLETCHER MOULTON L.J. read the following judgment:—The question involved in this appeal is a very simple one.

The defendant was the owner of some property at Weybridge known as the Limes estate which, so far as is material for the present case, consisted of a terrace of six shops known as Nos. 1 to 6, Limes Terrace. On another part of the same property there was a row of houses, but they were private houses and in my opinion do not affect the matter in issue in any way.

On March 18, 1910, the defendant let to the plaintiff for the term of twenty-one years the shop No. 4, Limes Terrace. In the lease there was a covenant that the lessee would not carry on upon the premises any dangerous, noisy, noxious, or offensive trade or business, except those of upholsterers, cabinet makers, furniture dealers, and French polishers, without the lessor's permission, and there was on the other hand a covenant by the lessor that he would not, during the continuation of the lease, let, or agree to let, any of the adjoining shops belonging to him on the Limes estate for the purposes of the trades or businesses of upholsterers, cabinet makers, furniture dealers, and French polishers. In June, 1911, the defendant leased No. 6, Limes Terrace to one Godden, taking only a covenant that he would not carry on thereat any trade or business excepting that of a cabinet maker, restorer of antiques, and dealer in works of art without the consent of the lessor. The plaintiff sues for damages for this, which he contends is a breach of the lessor's covenant in his lease, and at the hearing before Phillimore J. the learned judge decided in his favour and assessed the damages

at 150*l*. It is against this judgment that the present appeal is brought.

It is not denied that what the defendant has done would constitute a breach if the house let to Godden had been next door to that which is let to the plaintiff. But it is contended on behalf of the defendant that the word "adjoining" in the lessor's covenant in the lease to the plaintiff must be construed as equivalent to "physically touching," and that therefore the covenant relates only to Nos. 3 and 5, Limes Terrace. This is the sole question involved in the appeal.

The words of the covenant are that the lessor will not "let or agree to let any of the adjoining shops belonging to him on the Limes estate for the purpose of the trades or businesses of . . . . cabinet makers," &c. Its purpose was admittedly to protect the business of the plaintiff from the danger of a rival in the same business establishing himself close at hand. Under these circumstances I do not think that it would occur to any one but a lawyer to interpret the words as applying only to the houses next door. But it is contended on behalf of the defendant that the decided cases, and more especially the two cases *Vale & Sons* v. *Margate Street, &c. Buildings, Ld.* (1) and *Ind, Coope & Co., Ld.* v. *Hawkins* (2), have laid down as a matter of law that the word "adjoining" as applied to houses must be interpreted as meaning that the two houses are "absolutely contiguous without anything between them," to use the language of Parke J. in *Rex* v. *Hodges*. (3)

I fully accept the authority of those cases, but in my opinion we have not here to decide the abstract question of the meaning of the word "adjoining" apart from the context. We are entitled and bound to bear in mind the surrounding circumstances, and then it is our duty to construe the words as a whole. We are entitled (among other things) to consider the object of the covenant. This is pointed out by Bowen L.J. in his judgment in *Lightbound* v. *Higher Education Local Board*. (4) He was there dealing with a section of an Act of Parliament, and he lays down that there is a broad rule of

(1) 80 L. T. 487.
(2) 84 L. T. 168.
(3) 1 Moo. & M. 341.
(4) 16 Q. B. D. 577.

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construction "that in construing the words you must look at the subject-matter of the section and see what is its scope and object." This rule of construction is applicable also to the construction of contractual documents, and, applying it to the present case, it is evident that the object of this clause has nothing to do with physical contact between the houses. Bearing in mind the admitted object of the covenant, it is almost impossible to imagine that parties would insert a covenant of this kind solely in order to prevent the same trade being carried on next door. If, however, this consideration stood alone, I am not prepared to say that I should act upon it. But the language of the context is absolutely inapt to express such a restricted meaning as the defendant suggests. The words are "any of the adjoining shops belonging to him on the Limes estate." The word "any" points to a plurality, and the words that follow, namely, "belonging to him on the Limes estate," are evidently inserted as the definition of that plurality to which the covenant is to apply. Had the words been "either of the adjoining houses," the contention of the defendant would have been very difficult, if not impossible, to answer, because those words would have been the obvious and natural mode of expressing that which he asserts to be the meaning of the covenant. So much is this the case that I am satisfied that no one would, in lieu of using such words, have used the words which are to be found in the covenant if he had not intended it to apply to all the adjacent houses in Limes Terrace. Taking the words as a whole (which it is our duty to do) I have no doubt that the intention of the parties as expressed by the words used was that no one of that row of shops should be let for the purpose of the trade of a cabinet maker.

It is pressed upon us that in thus deciding we are departing from the rule of construction laid down by Lord Wensleydale in his opinion in *Grey* v. *Pearson* (1), that "in construing wills and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and

(1) 6 H. L. C. 61, 106.

ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther." In my opinion we are in no way departing from the rule of construction so laid down. The learned Lord is there dealing with the case of giving to words a meaning which they do not properly bear. But it is unquestionable (and indeed it was conceded in the argument on behalf of the defendant) that the word "adjoining" is normally used in the sense of "near to" as well as "in contact with." Where a word has two proper and recognized meanings Lord Wensleydale's canon of construction must be greatly modified, even if it applies at all. He does not mean to lay down that we must take the etymologically correct meaning of a word or that meaning which statistically or numerically is the most common unless to do otherwise would lead to an absurdity or inconsistency. The meaning of words is fixed by user alone, and, where the user of a word in more than one sense is established, the question in which sense it is used in a particular passage must be decided by the context and the surrounding circumstances, and no one meaning can be treated as having such paramount claims that it is to be adopted in preference to any other, unless its adoption would lead to an absurdity or inconsistency. To read Lord Wensleydale's rule of construction in any other sense would, in my opinion, be to give to it a meaning which that learned Lord never intended it to bear, and which would not be in accordance with the consistent practice of the Courts or the dictates of common sense.

For these reasons I am of opinion that the judgment of the learned judge was correct and that this appeal must be dismissed with costs.

BUCKLEY L.J. read the following judgment:—There are few words, if indeed there be any, which bear a meaning so exact as that the reader can disregard the surrounding circumstances and the context in ascertaining the sense in which the word is employed. Not even words expressive of number escape the ordeal. There are trades in which a dozen does not mean twelve nor a hundred five score.

There are words upon whose primary meaning there is no room for doubt. I may instance again the word "dozen." But this

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is not true of all words. Many are not of fixed, but of flexible, meaning. Such a word may have many primary meanings. It is for the reader, looking at the context, to say in which of those meanings it is employed. In making that determination, he must look at the subject-matter dealt with by the language in which the word occurs and see what is the scope and object of the instrument in which he finds it. Much discussion has passed before us upon Lord Wensleydale's language in *Grey* v. *Pearson*. (1) He is not speaking of the meaning of a single word. A single word may have a primary or a derivational or a conventional or an ordinary or a precise meaning. But it is impossible to say that a single word has a grammatical meaning. Lord Wensleydale is speaking, not of a word, but of a sentence, of a series of limitations in a will, and his words are that the grammatical and ordinary sense of the words is to be adhered to, unless, &c.

There are three words, "adjoining," "adjacent," and "contiguous," which lie not far apart in the meaning which they convey. But of no one of them can its meaning be stated with exactitude and without exception. As to "adjoining," the expression "next adjoining" or "immediately adjoining" is common and legitimate. This expression at once conveys that two things may adjoin which are not next to each other. "Adjacent" conveys that which lies "near to" rather than that which lies "next to." "Contiguous" is perhaps of all three the least exact. Any one of the three may by its context be shewn to convey "neighbouring" without the necessity of physical contact.

The cases which have been referred to serve as guides but not as authorities binding me in determining the meaning of the word "adjoining" in this lease. I must read the lease, and determine what is the meaning of the whole of this covenant containing, as it does, this word.

There were six houses forming a continuous terrace of shops. Was No. 6 a shop adjoining No. 4 within this covenant? That is the question to be determined. The appellant says that only Nos. 3 and 5 adjoin No. 4: that there are only two shops to which the covenant can extend.

(1) 6 H. L. C. 61, 106.

The Limes estate was an estate belonging to the lessor. It had originally been larger, and what remained to be dealt with at the date of this lease were the six shops I have mentioned and a certain number of houses (which were not shops) with back gardens and yards in a road at right angles to the road in which the six shops were situate. This statement of facts I take from the judgment of the learned judge, which the parties agree is in this respect correct. The words of the covenant are as follows: "He, the lessor, will not at any time during the continuance of this lease let or agree to let any of the adjoining shops belonging to him on the Limes estate" for certain purposes. These words seem to me to contemplate a plurality of shops exceeding two in number. They are to be shops belonging to the lessor on the Limes estate, which prima facie points to a number of shops belonging to him and lying on that estate. Further, the word employed is not "either," which would indicate one of two, but "any," which points to one or more of a number greater than two. Prima facie, therefore, upon those words alone it seems to me that "adjoining" here is by the context shown not to be limited to the case of actual contact. But further, I ought to consider what was presumably the scope and object of this covenant for the protection of the lessee, who was going to carry on there a particular class of business. The lessor's covenant is not to let any of the adjoining shops belonging to him on the Limes estate for the purposes of a certain business. The object was to protect the lessee in his business. It would be a poor protection if the restrictive covenant included No. 5 in this terrace of shops but did not include No. 6.

The decision of the Court of Appeal in *Ind, Coope & Co.* v. *Hamblin* (1) is one upon which much reliance has been placed. The report of this case is far from satisfactory. The facts as stated in 81 L. T. include a statement that the gardens of the houses in dispute stretched back to within five or six yards of the fence which separated the defendant's property from the bowling green. The facts as stated in 84 L. T. include a statement that the gardens stretched to that fence. The report in 48 W. R. 238 agrees upon this point of fact with the statement

(1) 81 L. T. 779; 84 L. T. 168.

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in 84 L. T. As regards my own judgment, as reported, the reporter makes me state the question for decision in words altogether inaccurate in an essential particular. I have a passion for accuracy. I cannot believe that I said that which is attributed to me in the first sentence of the judgment. The report in the *Weekly Reporter* throws no light upon this point. The Court of Appeal differed from me as to the meaning of the word "adjoining" in that particular deed. The decision is not based upon any principle of general application or by which I am bound in the present case. I accept the duty of determining what the word "adjoining" means in this lease. In my opinion it is not confined to shops physically in contact with the demised shop. I think it extends to No. 6, being another shop within the words "adjoining shops belonging to me on the Limes estate."

For these reasons I think that the learned judge was right and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiffs: *C. Haddon Gray.*

Solicitor for defendant: *J. O. Gosling.*

W. J. B.

[IN THE COURT OF APPEAL.]

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April 3.

VACHER & SONS, LIMITED *v.* LONDON SOCIETY OF COMPOSITORS AND OTHERS.

Trade Union—Action for Tort against—Maintainability of Action—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4, *sub-s.* 1.

Sect. 4, sub-s. 1, of the Trade Disputes Act, 1906, which provides that "an action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court," is general in its application and is not limited to tortious acts committed in contemplation or in furtherance of a trade dispute; an action for libel or conspiracy to libel relating to matters affecting the trade union and its members as such will not therefore lie against a trade union: *per* Vaughan Williams L.J. and Kennedy L.J. (Farwell L.J. dissenting).

Where it appears that an action against a trade union comes within the prohibition contained in s. 4, sub-s. 1, of the Trade Disputes Act, 1906, the Court or a judge may, upon an interlocutory application under Order XXV., r. 4, order the name of the trade union to be struck out of the writ and subsequent proceedings on the ground that they disclose no reasonable cause of action against the union: *per* Vaughan Williams L.J. and Kennedy L.J.

APPEAL from an order of Channell J. reversing an order of Master Wilberforce by which the name of the trade union had been struck out of the writ and all subsequent proceedings on the ground that the statement of claim shewed no reasonable cause of action against them.

The plaintiffs were a company registered under the Companies (Consolidation) Act, 1908, and carried on the business of parliamentary and general printers in London. The defendants were the London Society of Compositors, who were a trade union, and T. E. Naylor, the secretary, and A. E. Holmes, the organizing secretary, of the society. Prior to December, 1909, the plaintiffs had been in the habit of receiving from and executing for the London Municipal Society, the Christian Social Union, the Tariff Reform League, the United Committee for the Taxation of Land Values, and other societies and political organizations orders for the printing of various of their publications. For some time prior to December, 1909, the defendants had from

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time to time sent to each of the societies and organizations a document headed "The Compositors' Fair List and Guide," described in a covering letter from the defendants as "Our Fair List," and containing the names of certain printers, including the name of the plaintiffs. The letter contained a request that no orders for printing should be given to printers other than those included in the list.

The plaintiffs alleged that in December, 1909, the defendant Naylor sent to each of these societies and organizations a letter signed by him containing as an enclosure a copy of a new edition of the "Compositors' Fair List and Guide"; the letter was in the following terms:—"Dear Sir,—In forwarding the latest edition of our Fair List may I beg that you will consult this Guide before placing any further orders for printing? Owing to a recent advance movement in the trade, there have been several important alterations, and I shall be obliged if you will destroy the last edition sent to you. Yours faithfully, T. E. Naylor, Secretary." The copy enclosed commenced as follows: "The Compositors' Fair List and Guide to the London Printing Offices, comprising daily and weekly newspaper offices, book and magazine printers, jobbing printers, &c., recognized by the London Society of Compositors. To Authors, Publishers, Newspaper Proprietors, and all who have to do with book, newspaper and general printing. Before placing the contract for your printing, satisfy yourself that the work will be executed by one of the firms on this list. These are the only offices in London where trade union compositors are employed. Authors, when making arrangements with their publishers, are specially requested to stipulate that the printers of their work shall be selected from this list"; it then gave a list of London printing offices, in which the name and address of the plaintiffs were not included.

The plaintiffs further alleged that on July 13, 1911, the defendant Holmes, on his own behalf and also as agent for and on behalf of the other defendants, addressed and sent to the secretary of the United Committee for the Taxation of Land Values a letter signed by him, which was in the following terms:—"Dear Sir,—I am in receipt of certain pamphlets and the annual report of your association. I have recollection of visiting you at your

chambers some eighteen months since with regard to the printing work which was then and is now executed by a firm which certainly cannot be recognized as conforming to trade union principles. My recollection of that visit is that you undertook at the expiration of the printing contract to secure that the work should be placed in a fair house, and I regret to find that such is not the case. Under these circumstances you will understand that it is impossible for us to assist in the distribution of your literature or interest ourselves in any way other than to advertise to our members and trade unionists generally that your failure to support the trade union movement should indicate to them the inadvisability of supporting your association. Yours faithfully, A. E. Holmes, Organizing Secretary."

On July 28, 1911, the plaintiffs issued the writ in the present action, in which they claimed damages for conspiracy to libel the plaintiffs and to cause them damage by the publication of false and malicious statements, and also damages for libel contained in the letter of July 13, 1911, published in pursuance of the said conspiracy, and also damages for false and malicious statements published in pursuance of the said conspiracy, causing damage to the plaintiffs; and further claimed an injunction restraining the defendants and each of them, and the agents and servants of each of them, from further publishing or circulating the said alleged libels and false statements and any similar or other libels on the plaintiffs in the way of their business or otherwise.

The material paragraphs of the amended statement of claim were as follows:—

"4. In the latter part of the year 1909 the defendants, with intent to injure the plaintiffs in their business, and well knowing that the plaintiffs were in the habit of executing orders for printing received from the societies and organizations above mentioned, wrongfully conspired together to publish libels of and concerning the plaintiffs and of and concerning them in the way of their said business; as particulars of the acts and communications constituting the said conspiracy the plaintiffs will rely on the acts and communications which can be inferred from the covering letter and list set out in paragraph 6.

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"5. In pursuance of the said conspiracy the defendants and each of them falsely and maliciously published the libel on the plaintiffs set out in paragraph 6.

"6. In December, 1909, the defendant Naylor on his own behalf, and also as agent for and on behalf of the other defendants, falsely and maliciously wrote and published and caused to be written and published of and concerning the plaintiffs and of and concerning them in the way of their business and sent to each of the societies and organizations above mentioned a letter and list inclosed therewith [here the above covering letter was set out].

"7. By the said words and the removal and omission of the plaintiffs' name from the said list the defendants meant and were understood to mean that the plaintiffs had been guilty of unfair dealings in their business, that they were in the habit of treating their employees harshly and unfairly, that they never employed trade-union compositors, and that the plaintiffs were not fit and proper persons to be entrusted with the execution of orders for printing, and that no one ought to employ them in their business or otherwise.

"8. By reason of the facts hereinbefore complained of, the plaintiffs have been injured in their character, credit and reputation, and in the way of their business, and the London Municipal Society and the Christian Social Union have ceased to employ the plaintiffs for the printing of all documents which require the printer's imprint thereon, and the plaintiffs have lost and will lose the profits which they would otherwise have made in respect of the said printing.

"9. In the latter part of 1909 the defendants, with intent to injure the plaintiffs in the way of their business and well knowing that the plaintiffs were in the habit of executing orders received from all the societies and organizations above mentioned, wrongfully conspired and combined amongst themselves to procure, cause, and induce the customers of the plaintiffs in their business to cease to deal with them and not to continue to deal with them in their business; the defendants in pursuance of the last-mentioned conspiracy and combination wrongfully and maliciously procured, caused, and induced the London Municipal Society and the

Christian Social Union (who were customers of the plaintiffs) by threats and coercion towards them respectively to cease to deal with them in their business and not to continue dealing with them therein. As particulars of the acts and communications constituting the conspiracy and combination the plaintiffs will rely on the acts and communications which can be inferred from the covering letter and lists set out in paragraph 6 hereof: and as particulars of the said threats and coercions the plaintiffs will rely on the fact that the defendants sent the said covering letter and lists to the London Municipal Society and the Christian Social Union respectively.

"10. By reason of the facts stated in paragraph 9 the said society and the said union have ceased to employ the plaintiffs for the printing of any document requiring the printer's imprint thereon, and the plaintiffs have lost the profits which they would otherwise have made in respect of the said printing.

"11. In July, 1911, the defendants, with intent to injure the plaintiffs in their business, wrongfully conspired together to publish libels of and concerning the plaintiffs and of and concerning them in the way of their business.

"12. In pursuance of the conspiracy mentioned in the last preceding paragraph the defendants falsely and maliciously published the libel on the plaintiffs set out in the next following paragraph.

"13. On July 13, 1911, the defendant Holmes on his own behalf, and also as agent for and on behalf of the other defendants, falsely and maliciously wrote and published and caused to be written and published of and concerning the plaintiffs and of and concerning them in the way of their business, and addressed and sent to the secretary of the United Committee for the Taxation of Land Values a letter [here followed the letter of July 13, 1911, above set out].

"14. By the words set out in the preceding paragraph the defendants meant and were understood to mean that the plaintiffs had been guilty of unfair dealings in their business, that they were in the habit of treating their employees harshly and unfairly, and that the plaintiffs were not fit and proper persons to be entrusted with the execution of orders for printing, and that no one ought to employ them in their said business or otherwise.

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"15. By reason of the facts above set out the plaintiffs have been injured in their character, credit, and reputation and in the way of their business."

The plaintiffs claimed (1.) damages against the defendants for conspiracy and damages against the defendants and each of them for libel; (2.) damages against the defendants for conspiracy.

The defendants took out a summons under Order xxv., r. 4, to have the name of the defendants the London Society of Compositors struck out of the writ of summons and all subsequent proceedings in the action on the ground that no reasonable cause of action was disclosed against them.

Master Wilberforce made an order striking out the name of the defendants the London Society of Compositors, which order was reversed by Channell J. on the ground that the point was not one for summary decision upon an interlocutory application, but should be decided at the trial of the action. The defendants appealed.

Holman Gregory, K.C. (*Harold Morris* with him), for the defendants. The order of the Master was right and should be restored. This is an action of tort, and s. 4, sub-s. 1, of the Trade Disputes Act, 1906, provides in terms that an action against a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court. (1) The object of the section was to get rid of the effect of the decision in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2), where it was held that a trade union might be sued in its registered

(1) By 6 Edw. 7, c. 47 (Trade Disputes Act, 1906), s. 4, sub-s. 1, "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."

Sub-s. 2: "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

(2) [1901] A. C. 426.

name, and not merely through its trustees, as provided by s. 9 of the Trade Union Act, 1871. (1) The expression "act" or "tortious act" is qualified in ss. 1, 2, 3, and in s. 4, sub-s. 2, by the addition of the words "committed in contemplation or in furtherance of a trade dispute"; and the very fact that those words are omitted in s. 4, sub-s. 1, shews that the intention of the Legislature was that that sub-section should apply to all tortious acts without any limitation. The words cannot be read into the sub-section so as to limit its generality: *Bussy* v. *Amalgamated Society of Railway Servants* (2), per Darling J., with which *Rickards* v. *Bartram* (3), a decision of the same learned judge, is not reconcilable; the last-named case, in which it was held that an action for libel was maintainable, there being no existing trade dispute, was wrongly decided and should not be followed. The case of *Linaker* v. *Pilcher* (4), in which it was held that the trustees of a trade union were responsible for a libel published in a trade union newspaper, the property in which was vested in them, was decided before the Act of 1906 was passed and has no application to the present case.

It is not necessary that the consideration of the question whether the plaintiffs have a reasonable cause of action against the defendant society should be postponed until the trial of the action; there is ample jurisdiction in the Court or a judge to determine that question upon a summons under Order XXV., r. 4, to have the name of the defendant society struck out of the writ and subsequent proceedings on the ground that no

(1) By 34 & 35 Vict. c. 31 (Trade Union Act, 1871), s. 9, "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any Court of law or equity, touching or concerning the property, right, or claim to property of the trade union; and shall and may, in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any Court of law or equity, in their proper names, without other description than the title of their office . . . ."

(2) (1908) 24 Times L. R. 437.

(3) (1908) 25 Times L. R. 181.

(4) (1901) 70 L. J. (K.B.) 396; 84 L. T. 421.

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reasonable cause of action is disclosed : *Woods* v. *Lyttelton* (1); *Burr* v. *Smith*. (2)

Danckwerts, K.C. (*Hugh Fraser* with him), for the plaintiffs. The action is properly brought against the defendant society. Sect. 4, sub-s. 1, of the Trade Disputes Act, 1906, has not the effect of preventing all actions for tortious acts from being maintained against a trade union : *Osborne* v. *Amalgamated Society of Railway Servants*. (3) It is clear that a trade union would be liable for certain tortious acts. Suppose a trade union were to occupy an office, and to commit a nuisance upon the premises causing damage to a neighbour ; can it be said that the cause of action in respect of the nuisance is taken away by s. 4, sub-s. 1 ? And with regard to libels, it must be remembered that their publication is no part of the functions of a trade union—that is, it is unconnected with the protection of the members of the union. It is conspiracy to injure the plaintiffs' trade within the principle laid down in *Quinn* v. *Leathem*. (4) The intention of the Legislature was that sub-ss. 1 and 2 of s. 4 should be read together, and that in each of them the expression " tortious act " should be limited by adding the words " in contemplation or in furtherance of a trade dispute."

The case ought not to be disposed of summarily on an interlocutory application. Order xxv., r. 4, only applies where the case set up on the pleadings is clearly frivolous and vexatious : *Attorney-General of Duchy of Lancaster* v. *London and North Western Ry. Co.* (5); *Roberts* v. *Charing Cross Ry. Co.* (6), where the correct proposition is laid down by Farwell L.J. ; *Hubbuck & Sons* v. *Wilkinson* (7) ; *Kellaway* v. *Bury*. (8) The question raised in the present case is too important and too debateable to be decided on such an application.

Holman Gregory, K.C., in reply.

Cur. adv. vult.

April 3. VAUGHAN WILLIAMS L.J. read the following judgment:— This appeal raises the question whether the defendants, the

(1) (1909) 25 Times L. R. 665.
(2) [1909] 2 K. B. 306.
(3) [1910] A. C. 87.
(4) [1901] A. C. 495.
(5) [1892] 3 Ch. 274.
(6) (1903) 87 L. T. 732.
(7) [1899] 1 Q. B. 86.
(8) (1892) 66 L. T. 599.

London Society of Compositors, are entitled to have their names as defendants struck out of the writ of summons and all subsequent proceedings, upon the ground that the statement of claim discloses no cause of action against them under s. 4 of the Trade Disputes Act, 1906, in respect of any tortious act alleged to have been committed by or on behalf of the trade union. Master Wilberforce ordered the name of the defendants, the trade union, to be struck out; Channell J. reversed the Master's order. Hence this appeal.

I may in the outset read s. 4, sub-s. 1, of the Trade Disputes Act, 1906. [His Lordship read the sub-section.] The sub-section contains general words which seem prima facie to relieve trade unions and their officials, on behalf of themselves and all other members of the trade union, in respect of torts alleged to have been committed by or on behalf of the trade union, from all common law liability to be sued for their torts. The sub-section does not provide a defence which may be pleaded to such an action; it provides that no such action shall be entertained by the Court. In my opinion, according to the ordinary course of construction of an Act of Parliament, not only should a section relieving trade unions, whether of workmen or masters, from a common law liability be strictly construed, but the Legislature must be taken to have intended that a reasonable interpretation should be put upon its language. The words used are such that some limitation must be placed upon them.

There is no new principle involved in the construction of an Act of Parliament imposing new liabilities or creating new exemptions from the common law. In *In re Coal Consuming Gas Co., Grove's Case* (1), Bramwell B., speaking of s. 38 of the Companies Act, 1867, said: "There must be some limitation to the words used in the Act. That is conceded. It must be read as a contract entered into by the promoter 'as such.'" To read the Trade Disputes Act in the sense intended by the Legislature, I think that one must throughout this section read the words "trade union" as meaning "trade union as such." If, for example, a trade union conducted a newspaper in which it criticised a book having no relation to trade unions and in the

(1) (1875) 1 Ch. D. 182.

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course of the criticism defamed the author of the book, the Legislature cannot have intended that no action for libel should be entertained against the trade union or its officials. In the present case, however, the limitation which I suggest would not exempt the trade union from the protection afforded by the sub-section. The "fair list" plainly relates to matters affecting the trade union and its members as such, and I cannot doubt that this action is one which cannot be entertained by any Court.

It is said on behalf of the plaintiffs that such an order as the present ought not to be made until the trial of the action; but I see no reason for any such postponement. The facts and the nature of the action are not in dispute, and the question of the meaning and construction of the sub-section can be dealt with now. Mr. Danckwerts argued that there was something in s. 4, sub-s. 2, of the Act which recognized the entertaining in certain cases of an action of tort brought against a trade union. From that sub-section it seems that the liability of trustees of a trade union to be sued in the events provided for by s. 9 of the Trade Union Act, 1871, does not extend to torts "committed by or on behalf of the union in contemplation or in furtherance of a trade dispute." The question arises as to what these words mean. In *Conway* v. *Wade* (1) Lord Loreburn L.C., speaking of the same language in s. 3, said: "I think they mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing and the act is done in support of one side to it. In either case the act must be genuinely done as described, and the dispute must be a real thing imminent or existing." I think, dealing with this definition, that the libel in this case was an act done in contemplation and furtherance of a trade dispute, and that therefore the trustees of the trade union liable to be sued under s. 9 of the Act of 1871, if sued, would be protected by the exemption at the end of s. 4, sub-s. 2, in respect of torts which come within the words of exception, namely, acts committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

I do not understand that counsel for the plaintiffs in his

(1) [1909] A. C. 506, at p. 512.

argument differed from the conclusion at which I have arrived: I understand his argument to be that the exception contained in s. 4, sub-s. 2, recognizes that in some cases a trade union might be sued through its trustees, who would somehow have a remedy over against the trade union, not indeed in an action of tort, but in an action for an indemnity or for money paid on behalf of the union. I can find nothing in s. 4, sub-s. 2, which in any way affects the words of sub-s. 1. Nor do I think that if the words "in contemplation or in furtherance of a trade dispute" are read as qualifying or as limiting the operation of s. 4, sub-s. 1, it would make any difference in the present case, for I am clearly of opinion that the act alleged in this action—libel—was an act done in contemplation or in furtherance of a trade dispute by the trade union as such.

I think that this appeal must be allowed and that the order of the Master must be restored.

FARWELL L.J. read the following judgment:—This is an appeal from the refusal of Channell J. in chambers to make an order in favour of the defendant society under Order xxv., r. 4, and I should have been glad to be able to affirm the order of the learned judge on the simple ground adopted by him—that such a case as the present is not within the Order. As, however, the case has been fully argued, I must express my opinion, treating the allegations in the statement of claim as admitted as though the case had been heard on demurrer.

The case thus presented raises the abstract question whether, on the true construction of s. 4 of the Trade Disputes Act, 1906, a trade union can claim immunity for all and any tortious acts committed as and when it pleases, or whether the immunity given by that section is confined to acts reasonably and properly incident to its powers as a trade union although resulting in injury and damage to third persons; and further whether such tortious acts must not be in contemplation or furtherance of a trade dispute. The defendants in the present case admit that they "wrongfully conspired together to publish libels of and concerning the plaintiffs and of and concerning them in the way of their said business," and that "in pursuance of the said conspiracy

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the defendants, and each of them, falsely and maliciously published the libel on the plaintiffs there set out." Then follows the innuendo that the plaintiffs had been guilty of unfair dealings in their said business, and so on; and further libels are set out which it is not necessary here to particularize, as the defendants claim the right to libel generally and contend that s. 4 has given them complete immunity in respect of all libels and other tortious acts. No argument was addressed to us on the particular libel; it was not even read to us in extenso, and I express no opinion upon it.

Sect. 4, sub-s. 1, at first sight appears to be expressed in general terms, but a consideration of the circumstances in which it was passed, and the object which it was intended to attain, shew that some limit must have been intended to be placed on its generality. It was intended to reverse the law as it was expressed in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) and to prevent the bringing of the actions suggested by Lord Macnaghten's speech in that case. We have already considered this Act in *Conway* v. *Wade* (2); and the Court of Appeal, of which I was a member, thought the words of ss. 3 and 5 unambiguous, and gave them their strict construction accordingly. The House of Lords, however, reversed the decision on the ground that the Act was to be so construed as to avoid the conclusion that the words "furtherance of a trade dispute" implied stirring up strife, and that regard was to be had to the nature of trade unions and the alteration of the law then thought necessary for their benefit. I think myself at liberty therefore, and indeed bound, to try and find some fair construction that will avoid the conclusion that s. 4 has given trade unions a charter of absolute immunity from the consequences of all tortious acts, and has thereby encouraged and induced the commission of torts. It is clear that not all lawful acts are open to a trade union. A trade union is a body formed for the purpose of performing certain defined functions, and is as strictly limited to those functions as a limited company is by its memorandum of association — see *Osborne* v. *Amalgamated Society of Railway Servants* (3)—including, of course, such things

(1) [1901] A. C. 426.
(2) [1909] A. C. 506.
(3) [1909] 1 Ch. 163; [1910] A. C. 87.

as are fairly incidental to such functions: *Attorney-General* v. *Great Eastern Ry. Co.* (1) It is one thing to say that these functions and the matters fairly incidental to such functions may be performed notwithstanding that damage is thereby caused to others for which an action would, apart from s. 4, lie; it is quite another thing to say that all torts of any description are authorized, whether connected with trade-union functions or not.

It is no part of the functions of a trade union to print and publish a newspaper; but if it did, and if none of its members interfered to restrain the expenditure of the money of the union as being ultra vires, what reason is there for granting it immunity from any libels that it may think fit to print? libelling, for example, at an election, or indeed at any time, some politician whom the union desired to punish or to terrorize, or some employer whose business it wished to injure, and continuing such libels indefinitely? for the immunity extends to injunctions to restrain future torts as well as to damages for the past. It is irrelevant to suggest that no trade union would be likely to do such a thing: the question is whether the Legislature has given them the power to do it, and to continue to do it with impunity, if they choose. If the matter were of sufficient public importance—for example, a conspiracy between a number of trade unions for an illegal purpose, that is, both ultra vires and tortious—I have no doubt that the Attorney-General could obtain an injunction to restrain them: see *London County Council* v. *Attorney-General* (2); and, if so, s. 4 ought to receive such a construction as will enable any individual specially injured by a similar ultra vires and tortious act to recover damages for the past and obtain an injunction to restrain its repetition in the future. The case of libel is peculiarly offensive: it assumes the printing and publication of a lie, known to be such, for the purpose of injuring the person libelled. No honest trade unionist can say that it is necessary or expedient in the interests of his union to publish such lies, and the injury to the person libelled may be enormous. The immunity given by the Act extends to unions of masters as well as to unions of men. It is of the utmost importance to the public that the truth, and nothing but the

(1) (1880) 5 App. Cas. 473. (2) [1902] A. C. 165.

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truth, should be told in matters of labour disputes and other affairs of general interest. I assume that the Legislature had some reason for giving trade unions immunity for such torts as were committed in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) on the ground of the difficulty of conducting a strike without some such occurrences; but this does not at any time apply to a libel, and least of all in times of peace when there is no strike affecting the libeller, or affecting even any other union with which the libeller might be considered in sympathy. I have come, therefore, to the conclusion that the proper construction of s. 4 is to read the words "any tortious act alleged to have been committed by or on behalf of the trade union" as confined to acts which are not ultra vires the union. These may be committed with impunity although the manner in which they are carried out would, but for the Act, have given a cause of action for tort to a third person; but the section does not enlarge the powers of the union to do any acts, lawful or unlawful; it only gives immunity in respect of the mode of exercise of acts which are not ultra vires.

The next question is this: Is the immunity (whether absolute or limited to the extent above stated) unlimited in point of time, or is it confined to such periods as are covered by the words "in contemplation or in furtherance of a trade dispute"? The title of the Act is "The Trade Disputes Act," and, although the title is no part of the law, it may be used "for the purpose of ascertaining generally the scope of the Act": see Lord Macnaghten in *Fenton* v. *Thorley & Co.* (2) Moreover, every section in the Act contains the words "in contemplation or in furtherance of a trade dispute"; in s. 1 the alteration of the law of conspiracy, in s. 2 peaceful picketing, and in s. 3 liability for inducing to break contracts and the like, are each thus restricted. Sect. 4, sub-s. 1, does not contain the words, but the exception in sub-s. 2 does and is somewhat remarkable. It first preserves the liability of the trustees of the union to be sued in the events provided for by s. 9 of the Trade Union Act, 1871. But this liability is confined to actions in respect of property, and does not extend to actions of tort apart from property: see *Taff Vale Ry. Co.* v.

(1) [1901] A. C. 426. (2) [1903] A. C. 443.

Amalgamated Society of Railway Servants (1); for example, actions for obstructing ancient lights or for nuisance to their neighbours' premises would lie against them, but libel would not. It appears also from Lord Lindley's speech that they could have been sued on a judgment obtained against the trade union for tort. The section then contains an exception from liability in respect of any tortious act "committed by or on behalf of the union in contemplation or in furtherance of a trade dispute." To what can this exception apply? It appears to me extravagant to suppose that the Legislature contemplated the possibility of the trustees of the trade union blocking ancient lights or flooding their neighbours' premises with filth or the like "in contemplation or furtherance of a trade dispute." The exception can only have reference to acts usually done in such an event. Moreover, the words are not "any tortious act committed by the trustees," but "committed by or on behalf of the union." The same words are used in sub-s. 1. The defendants in an action for obstructing ancient lights, or the like, would be the persons in possession of the premises, namely, the trustees who own the legal estate and allow the union officials to occupy; and in my opinion the only fair construction is to refer the exception to acts committed by or on behalf of the union for which judgment might be recovered against the trustees. If this be so, it is clear that all such acts are not given immunity, but only such as are done in contemplation or furtherance of a trade dispute. Otherwise the exception is meaningless: if there is no liability at all, it is idle to insert an exemption giving freedom from liability in a particular case. I have therefore come to the conclusion that the tortious acts in s. 4 are confined to acts "in contemplation or in furtherance of a trade dispute," and that the judgment of Darling J. in *Rickards* v. *Bartram* (2) was right.

I am confirmed in this opinion by the consideration that it is a well settled maxim of construction that Acts creating monopolies or granting privileges are to be construed strictly: and, whatever this may mean, it means at least that the rest of the public are not to be deprived of their rights to any greater extent than is absolutely necessary to give effect to the intent and meaning of

(1) [1901] A. C. 426. (2) 25 Times L. R. 181.

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the Act, and that, if any doubt or ambiguity exists, the rights of the public are to be preferred. If there ever was a case for the application of this rule of construction, it is surely the present, where the privilege claimed is given to a class exercising great powers and controlling large wealth, and consists in a licence to commit torts (in plain English, to injure their neighbours) with impunity, and to inflict losses and misery on all or any of His Majesty's subjects as long as they please, without responsibility.

In my opinion this appeal should be dismissed with costs, and the action should go to trial and the actual facts of this case should be proved in the usual way.

KENNEDY L.J. read the following judgment:—In this action the plaintiffs, who are printers, sue the defendant society, which is a trade union, and two other defendants, who are respectively the secretary and the organizing secretary of the defendant society, claiming damages for torts which the plaintiffs allege to have been committed by all three of the defendants. These torts, as stated in the plaintiffs' pleading, consist of, first, libel, and, secondly, conspiracy to injure the plaintiffs as printers by the publication of the alleged libel. The libels in every case but one consist of the contents of a document entitled "The Compositors' Fair List and Guide," sent by the defendants with covering letters to actual or possible customers of the plaintiffs. In paragraph 13 there is a further libel charged in respect of a letter therein set out which was addressed by the defendant Holmes, as agent (so the plaintiffs allege) of his co-defendants as well as on his own behalf, to the United Committee for the Taxation of Land Values. The plaintiffs in substance and effect allege in their statement of claim that the meaning and the purpose of all these communications were to injure the plaintiffs by representing that the plaintiffs had been guilty of unfair dealing in their business as printers; that they treated their employees harshly and unfairly and never employed trade-union compositors, and were not therefore persons fit to be entrusted with the execution of orders for printing. For the purpose of deciding the matter of the present appeal it must be assumed that the plaintiffs can substantiate their charges of tort as pleaded by them in the statement of claim.

The application with which we have to deal is an application to strike out the name of the defendant society from the writ of summons and all subsequent proceedings in this action, under Order xxv., r. 4, on the ground that the case as presented by the plaintiffs in their pleading discloses no reasonable cause of action against the defendant society. Channell J. in chambers dismissed this application, giving leave to appeal; and this Court has to say whether that decision was right or not. The question is, undoubtedly, one of importance, for it involves the interpretation of s. 4, sub-s. 1, of the Trade Disputes Act, 1906. If I felt a doubt as to the meaning and effect of this enactment in relation to the present case, I should assuredly affirm Channell J.'s decision, and leave the point to be argued at the hearing of the action. I have, however, come to the conclusion that the meaning and effect of the enactment in relation to the plaintiffs' action are not open to any doubt: that the statement of claim, every allegation in which I assume for the purpose of deciding the question before us to be true, does not disclose any reasonable cause of action against the defendant society, and therefore that this application to strike out its name as a defendant ought to be allowed. Nothing, as it appears to me, could be clearer or more explicit than the language of the enactment itself: "An action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." The statement of claim alleges tort—libel and conspiracy: it sues this defendant, the trade union, in respect of those alleged torts. It follows, as I venture to think, that we cannot allow such an action to be entertained by the High Court of Justice against this defendant without contravening the express provisions of the Act of Parliament.

What are the arguments against this view? I trust that I do no injustice to the case as it was presented to us by counsel for the plaintiffs if I state the arguments put forward by the plaintiffs in the following propositions. First, it is inconceivable, or at all events most improbable, on grounds of public policy, that the Legislature should have accorded so large and special an immunity to a trade union; and the Court therefore ought to presume in

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favour of any limitation which can reasonably be suggested in order to restrict the effect of the enactment. Secondly, we may infer such limitation from the presence in ss. 1 and 3 of the words "an act done in contemplation or furtherance of a trade dispute," and the presence of similar words in s. 4, sub-s. 2, and from the provision in s. 5 that "this Act may be cited as the Trade Disputes Act, 1906"; and therefore we may properly read into s. 4, sub-s. 1, after the words "any tortious act alleged to have been committed by or on behalf of the trade union" the words "in contemplation or furtherance of a trade dispute." Thirdly, s. 4, sub-s. 2, is inconsistent with the attribution of its natural meaning to the language of s. 4, sub-s. 1. I must confess myself unable to attach weight to these arguments.

In regard to the alleged improbability of the Legislature having meant what it appears from the natural and ordinary sense of the words in s. 4, sub-s. 1, to have enacted, I say that I decline to speculate in regard to any statutory enactment which it becomes my duty to interpret as to what was the policy to which the Legislature thought it was giving the force of the law. Nothing in my humble judgment could be more dangerous, if the words of a statute according to their natural grammatical sense are plain, than to allow oneself to drift into a wilderness of conjectures as to the a priori probability or improbability of the Legislature having intended to say what it has in fact said. I agree entirely with the proposition that, in construing and applying s. 4, sub-s. 1, inasmuch as it accords — as on any view it does—a novel immunity from legal proceedings to one particular kind of association, the enactment ought to be strictly construed. I agree also that if a section in an Act of Parliament is either on its face ambiguous or, if read in that which is prima facie the natural meaning of the words, is plainly inconsistent with the context and the very purpose of the Act of which it is part, it is legitimate, in construing the section, to treat the purpose appearing in the Act as the governing element in the choice of interpretations, even although in the latter of the two cases which I have put a less natural meaning has in consequence to be imposed upon the language of the section. None of these considerations, however, appears to me to avail

the plaintiffs here. Construe s. 4, sub-s. 1, as strictly as one can, its simplicity and freedom from ambiguity are, in my humble judgment, transparently clear. There is nothing in the purpose of the Act—and the Act must speak for itself—with which the natural interpretation of s. 4, sub-s. 1, is inconsistent.

It is convenient in this connection to consider the limitations which the plaintiffs seek to introduce into s. 4, sub-s. 1, and the arguments which they endeavour, as I have already stated, to draw from the language in ss. 1, 3, and 5, and from the title of the Act itself in s. 5. The plaintiffs propose to read into s. 4, sub-s. 1, after the words "committed by or on behalf of the trade union" the words "in contemplation or furtherance of a trade dispute," or at any rate to add words to that effect. Why? Because they argue that such words are to be found where, under ss. 1, 3 and 4, sub-s. 2, the Legislature is granting a degree of immunity from legal liability for wrong-doing to individuals; and it is reasonable to infer that it was only subject to the same limitation that the Legislature intended to grant immunity from wrong-doing to the trade union. I can only say that I see nothing to compel me to make such an assumption as to the intention of the Legislature. Knowing, as every one does, the controversy as to the protection of trade union funds, I decline to infer from the limitation of the immunity of individuals in other sections that the Legislature could not have intended to give an unlimited measure of immunity to the trade union. And, to my mind, the very fact that in each of those other parts of this short Act which are referred to by the plaintiffs we find the express insertion of the limitation makes it most improbable, to say the least, that the omission of such a limitation in s. 4, sub-s. 1, was a casual slip and not intentional.

I am not impressed by the argument founded by the plaintiffs' counsel on the title of the Act and on the provision in s. 5, sub-s. 1, that the Act may be cited as the Trade Disputes Act, 1906. If the Act is by its title an Act to provide for trade disputes, it is also by its title an Act to provide for the regulation of trade unions; if under s. 5 it may be cited as the Trade

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Disputes Act, 1906, the Trade Union Acts of 1871 and 1876 and this Act, according to the same section, may be cited together as the Trade Union Acts of 1871 to 1906.

This brings me to the consideration of the last of the arguments which were put forward on behalf of the plaintiffs. It is contended that s. 4, sub-s. 2, shews, or tends to shew, that some such limits as the plaintiffs suggest must be read into s. 4, sub-s. 1. I venture to think that the purposes for which s. 4, sub-s. 2, was inserted are not difficult to understand, and that nothing in its provisions requires or justifies a rejection of the natural interpretation of sub-s. 1. The first half of sub-s. 2 runs thus: "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, section 9." That section empowered the trustees of a trade union to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint, in any Court of law or equity, touching or concerning the property, right, or claim to property of the trade union; and provided that they should and might sue or be sued, plead or be impleaded, in any Court of law or equity, touching or concerning the property, right, or claim to property of the trade union; and provided that they should and might sue or be sued, plead or be impleaded, in any Court of law or equity, in their proper names, without other description than the title of their office. But for the provision of the first half of s. 4, sub-s. 2, of this Act, which preserves the liability of the trustees to be sued in the events provided for by s. 9 of the Trade Union Act, 1871, it might have been successfully contended that the operation of the previous sub-section was to deprive a person who has been injured in a matter touching or concerning the property of the trade union—as, for example, by a nuisance—from any remedy. This the Legislature apparently did not desire; and the first half of s. 4, sub-s. 2, effectually preserves the right of action for such torts. But if this section had stopped at its first half, an action could have been brought against the trustees under s. 9 of the Act of 1871, if the subject of claim was one touching or concerning the property of the union, even if the claim was based on tort which had been done in contemplation or furtherance of a trade dispute,

and so an exception would have been introduced to the scheme of the Act which is contained in ss. 1 and 3 of the Act of 1906. To prevent this, the Legislature enacted the second half of sub-s. 2, "except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute." So s. 9 of the Act of 1871 stands subject to the exception that the act complained of and forming the basis of claim cannot be made the subject of claim against the trustees if that act is one done in contemplation or furtherance of a trade dispute. I am unable to see, therefore, in what way sub-s. 2 assists the plaintiffs in their claim to insert such a limitation as they suggest in sub-s. 1. In my opinion the language of that sub-section must be read in its natural sense without the introduction of any qualifying words.

I have only to add that I have had an opportunity of reading and considering the judgment of Vaughan Williams L.J., and I entirely agree in his conclusion that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Scatliffs.*

Solicitors for defendants: *Shaen, Roscoe, Massey & Co.*

W. J. B.

1912
Oct. 17, 18.

THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SJOLAND AND METZLER.

Criminal Law—Obtaining Money by False Pretences—"Three Card Trick"—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

Where two confederates are engaged in what is known as the three card trick—a game in which one player, having shewn three cards, places them face downwards and rapidly shifts their relative positions, and then the other player has to indicate the position of a particular card—the fact that they fraudulently pretend to be strangers and when playing together arrange that the one who has to point out the particular card shall win, with the view of inducing the prosecutor to play, is not a "fraud or unlawful device or ill practice in playing at or with cards" within the meaning of s. 17 of the Gaming Act, 1845, so as to support a charge of obtaining from the prosecutor by false pretences money won from him at the game.

Reg. v. *Bailey and Others* (1850) 4 Cox, C. C. 390, followed.

RULE for habeas corpus.

The Norwegian Government demanded the extradition of the applicants, A. H. Sjoland and A. W. S. Metzler, two Swedish subjects who had been charged in Norway with having on June 7, 1912, at Christiania, "through a fraudulent behaviour in card playing tricked O. J. Karlsen, a farmer, out of Kr.3260" contrary to ss. 270 and 271 of the Norwegian Penal Code. They were brought before the magistrate at Bow Street, who committed them to Brixton Prison with a view to their extradition for the offence of obtaining money by false pretences. From the evidence it appeared that the prosecutor had on June 7 come to Christiania to draw a sum of Kr.3260 out of the Central Bank At the entrance to the bank he met a stranger, whom he afterwards identified as Metzler, and he informed the stranger that he was about to draw a sum of money out of the bank. On coming out of the bank the prosecutor met Metzler again in the street and they walked up the town together, and were subsequently joined by another man, afterwards identified as Sjoland, who inquired the way to the castle. The prosecutor did not perceive that Sjoland and Metzler knew one another. They all three went into a confectioner's shop to get some beer, and while

they were there Sjoland produced from his pocket four cards. These cards were all black on the back, and on the other side three of them were quite white and on the fourth there were some figures. Metzler and Sjoland commenced playing with the cards, the game being played in the following manner. Sjoland took two cards in each hand and held them up so that it could be seen where the card with the figures on was. He then placed all the four cards on the table in a row face downwards, and shuffled them by placing a finger on each of two cards and altering their place in the row. This was done four or five times, and the other player was invited to draw a card. If he drew the card with figures on he won the stake which had been deposited before the game commenced. Sjoland and Metzler played several games, sometimes one winning, sometimes the other. The prosecutor having seen them play proposed to play himself. He played against Sjoland for various stakes, Sjoland in each case laying out and shuffling the cards. In the result the prosecutor lost Kr.3260. The prisoners having obtained a rule nisi for a writ of habeas corpus on the ground that the evidence was not sufficient to justify a committal for the offence of obtaining money by false pretences,

R. D. Muir (*Sir Rufus Isaacs, A.-G.*, and *G. A. Branson* with him) shewed cause. It is conceded that unless the case can be brought within s. 17 of the Gaming Act, 1845, the committal cannot be supported, but the evidence is sufficient to warrant a conviction under that section. It provides that "Every person who shall by any fraud or unlawful device or ill practice in playing at or with cards . . . . win from any other person . . . . any sum of money . . . . shall be deemed guilty of obtaining such money . . . . from such other person by a false pretence with intent to cheat or defraud such person of the same." There was sufficient fraud to satisfy the section in the pretence by the two men that they were strangers to each other, whereby the prosecutor was induced to play.

Herbert Smith, in support of the rule. It may be that the facts would be sufficient to support a charge of conspiracy to cheat, but that offence is not within the Extradition Treaty with

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Norway. To amount to an offence under s. 17 of the Act of 1845 the fraud must be "in playing" with the cards, it must be a fraud put in practice during the game itself. It is not enough that a fraudulent device was resorted to before the game with the prosecutor commenced with the view of inducing him to play. It was so ruled by Mr. Charles Law, the Recorder of London, in *Reg.* v. *Bailey and Others.* (1) And there was no fraud used in the playing of the game. It was the ordinary three card trick. The prisoner won by reason of his skill in manipulating the cards with sufficient rapidity to deceive the prosecutor's eye. There is no case in which the three card trick has ever been made the subject of an indictment under the Gaming Act, 1845.

LORD ALVERSTONE C.J. As I understand the prosecutor's deposition all that he complains of is that he was induced to play at a game by which he lost his money. He states in effect that he believed the two men to be strangers; and he says that he was induced to play this game by the fact that when the men whom he so believed to be strangers were playing against one another the one who had to guess the position of the card was sometimes successful. It seems to me that fraudulent conduct whereby the prosecutor is induced to play and which is preliminary to the playing itself is not sufficient to constitute an offence under the statute. The section in plain terms says that there is to be some fraud or unlawful device or ill practice "in playing" at cards. Then was there any evidence of that? What is known as the three card trick is a game in which one player backs his ability to indicate the position of a particular card, and the other player by sleight of hand and quickness of movement in manipulating the cards in such a way as to deceive the eye induces the former to indicate the wrong card. That in my opinion does not amount to fraud or unlawful device or ill practice; it is sleight of hand and nothing more. Under these circumstances I am of opinion that there was no evidence of any offence according to English law for which extradition could be demanded under the Norwegian treaty, and the magistrate ought

(1) 4 Cox, C. C. 390.

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not to have committed the men to prison. The rule must be made absolute.

CHANNELL J. I am of the same opinion.

AVORY J. I agree. I wish to add that the Crown seeks in this case to support the committal upon the ground only that the case comes within s. 17 of the Act of 1845. It is not alleged that there is here evidence of any specific false pretence by means of which this money can be said to have been obtained other than such as arises by inference from the statute. The case which has been cited to us of *Reg.* v. *Barker and Others* (1) is a direct authority that under such circumstances as the present the conduct of these men does not amount to a fraud or unlawful device within the statute. I only add this for the purpose of guarding against its being said that in no such case can an indictment ever be framed for obtaining money by false pretences.

Rule absolute.

Solicitor for applicants: *The Official Solicitor.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 4 Cox, C. C. 390.

J. F. C.

1912
Oct. 28.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* MAY.

Criminal Law—Indecent Assault—Consent—Direction to Jury.

If on a prosecution for indecent assault there is no evidence from which the jury can reasonably infer that the prosecutrix consented to the acts alleged to have been committed by the accused, it is not necessary that the jury should receive any direction on the question of consent.

Appeal against conviction.

The appellant was convicted at the Berkshire quarter sessions on an indictment which charged him with having indecently assaulted one Mary Elizabeth Griffin on August 18 and 25.

Griffin, who was nineteen years of age, was a domestic servant in the service of the appellant. She was cross-examined at the trial at considerable length, the cross-examination being directed to shewing not only that her story was wholly untrue, but that, if there had been any acts of indecency committed upon her by the appellant, she had been a consenting party. As will be seen hereafter the Court came to the conclusion that there was no evidence from which the jury could reasonably infer consent, and it is therefore unnecessary to set out in detail the specific matters dealt with in the cross-examination.

The appellant gave evidence and denied Griffin's story in every particular. In cross-examination he was asked: "Is your defence that the girl consented to what was done or that nothing took place? Answer.—I say, of course, she could not consent to a thing which never took place. Question.—You do not suggest that the girl could have consented to anything? Answer.—No."

Counsel for the appellant in his speech to the jury at the conclusion of the evidence, in addition to asking the jury to accept the appellant's evidence as true, pointed out that if the girl had consented to what she alleged had taken place no assault had been proved, and after criticizing in detail her story

he contended that on the girl's own evidence the jury ought to find that she had in fact consented.

Counsel for the prosecution told the jury that, having regard to the appellant's answers in cross-examination, the consent of the girl was not in issue in the case.

The chairman in summing up did not refer in any way to the question of consent.

The grounds of appeal were (1.) that the chairman omitted to direct the jury that although the defendant denied the facts alleged by the prosecutrix they must be satisfied that she did not consent, and that, if she consented to what was done, the offence was not made out; and (2.) that the counsel for the prosecutrix in his final address to the jury informed them that, as the defendant had not alleged in his evidence that the prosecutrix consented, consent was not an issue in the case, and that the chairman in summing up gave the jury no direction upon this issue.

Cranstoun and *Cecil Walsh*, for the appellant. It is clear law that consent is an absolute defence to a charge of indecent assault (unless the person assaulted is under thirteen), and that the onus is on the prosecution to negative consent. In the present case it is not denied that the main line of defence at the trial was that the girl's story was wholly untrue; but the appellant's counsel, both in cross-examining the girl and in addressing the jury, distinctly raised the question of consent. Counsel for the prosecution on the other hand told the jury that after the evidence of the appellant consent was not an issue in the case. It therefore became the duty of the chairman to direct the jury on that question. The effect of his not doing so must have been to lead the jury to think that, even if they believed that the girl had consented, they must nevertheless convict the appellant. In *Rex v. Horn* (1), an indecent assault case, the defendant was represented by counsel and the defence of consent was never raised, yet the conviction was quashed because the chairman had not properly directed the jury as to consent. A

(1) (1912) 76 J. P. 270.

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criminal trial differs from a civil trial. In the latter the defendant must clearly raise every point on which he intends to rely, but in a criminal trial, whatever line the defence may take (and it makes no difference whether the prisoner is represented by counsel or not), it is the duty of the Court to see that the case for the prosecution is properly proved, and that the jury are made acquainted with the essential elements of the crime. "If a mistake had been made by counsel, that would not relieve the judge from the duty to see that proper evidence only was before the jury": *Reg.* v. *Gibson*, per Wills J. (1) The omission by the judge, when summing up, to put before the jury the defence in all its aspects, and to direct the jury on the whole defence, is a ground for quashing a conviction: *Rex* v. *Deana*. (2) In the circumstances of this case it is impossible to say that if the jury had been directed on the question of consent they would have convicted the appellant: *Rex* v. *Stoddart*. (3)

Hon. R. W. Coventry and *A. S. Carr*, for the prosecution. Now that prisoners can give evidence and thus put their real defence before the jury, the issues in criminal cases have become very much narrowed, and there is no difference in principle between criminal and civil trials. The cross-examination of the girl failed to elicit anything which could be called evidence of consent; the appellant in his evidence expressly disclaimed any intention of suggesting consent; and even if the jury had been directed on the question they could not possibly have found consent. There is therefore no ground for quashing the conviction. *Rex* v. *Horn* (4) was a very different case, for there the jury had been misled by the summing-up, as they were told in effect that although there were certain circumstances tending to shew consent, yet, as the defendant had not raised that issue, they need not consider the question.

Cranstoun in reply. The appellant could hardly be expected to have answered otherwise than as he did the questions as to suggesting consent put to him in cross-examination; and the fact that he did answer the questions in that way made it all the

(1) (1887) 18 Q. B. D. 537, at p. 543.
(2) (1909) 73 J. P. 255.
(3) (1909) 73 J. P. 348.
(4) 76 J. P. 270.

more important that the question of consent should have been properly left to the jury. 1912

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The judgment of the COURT (Lord Alverstone C.J., Channell, Phillimore, Avory, and Horridge JJ.) was delivered by

LORD ALVERSTONE C.J. Apart from the decision of this particular case, the argument has raised a point of general importance, and the Court thinks it desirable to lay down, as far as it can, the principle applicable to cases of this sort. The Court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negativing consent being on the prosecution and as to the evidence in the particular case bearing on the question. But if the facts proved in evidence are not such that the jury might reasonably infer consent, and particularly if the defence has been so conducted that the question of consent has not been raised or has become an entirely secondary issue, then it is not necessary for the judge to give a direction to the jury on the point. It is of course quite impossible to lay down a general principle which will be applicable to every conceivable case that may arise, but we think that this indication of the principle upon which judges should act in directing juries in cases of this class will be sufficient in the generality of cases. In the present case it has been contended that the conviction ought to be quashed because there was no direction to the jury on the question of consent. We have therefore to consider whether the facts were such that the jury could reasonably have inferred consent. We are of opinion, having considered the whole of the evidence most carefully, and taking into consideration that the real issue was whether the alleged acts had ever been committed, that the facts were not such as to require any direction on the question of consent. We are also clearly of opinion that if the jury had been directed on the question they would not have found that there had been consent.

Even if the chairman's direction could be regarded as in any way defective, we should have to consider whether there has been a substantial miscarriage of justice. We are of opinion that

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having regard to the whole evidence, and particularly to the evidence of the appellant himself, it is impossible to say that there has been any miscarriage of justice.

Appeal dismissed.

Solicitors for appellant: *Webster & Webster, for E. T. Hatt, Reading.*

Solicitor for prosecution: *Director of Public Prosecutions.*

F. O. R.

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Oct. 18, 21.

SPIERS & POND, LIMITED *v.* GREEN.

Milk—Carrying on Trade of Purveyor of Milk—Sale of Milk at Railway Station Buffet—Necessity of Registration—Dairies, Cowsheds, and Milkshops Order, 1885, *art.* 6. (1)

The keepers of a refreshment room at a railway station in the course of their business sold milk by the glass to such of their customers as asked for it. The amount so sold by them did not exceed three or four glasses per week:—

Held, that they did not "carry on the trade of a purveyor of milk" within the meaning of art. 6 of the Dairies, Cowsheds, and Milkshops Order, 1885, so as to require registration thereunder.

Case stated by a metropolitan police magistrate.

An information was laid by the respondent, William Green, against the appellants, Spiers & Pond, Limited, charging that

(1) By The Dairies, Cowsheds, and Milkshops Order, 1885, art. 6, sub-s. 1, "It shall not be lawful for any person to carry on in the district of any local authority the trade of cowkeeper, dairyman, or purveyor of milk, unless he is registered as such therein in accordance with this article."

Sub-s. 6: "A person who sells milk of his own cows in small quantities to his workmen or neighbours, for their accommodation, shall not, for the purposes of registration, be deemed, by reason only of such selling to be a person carrying on the trade of cowkeeper, dairyman, or purveyor of milk, and need not, by reason thereof, be registered."

Art. 13: "A local authority may from time to time make regulations for the following purposes or any of them: . . . . (*d*) for prescribing precautions to be taken by purveyors of milk and persons selling milk by retail against infection or contamination."

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they did on December 5, 1911, carry on at the Metropolitan Railway Station, Farringdon Street, in the borough of Finsbury, the trade of a purveyor of milk without being registered as such therein in accordance with the Dairies, Cowsheds, and Milkshops Order, 1885, as amended by the Order of 1886. The magistrate convicted the appellants subject to the following case.

At the hearing of the information the following facts were proved or admitted:—

The appellants were and are the tenants and occupiers of a refreshment buffet and bar at the Farringdon Street Station of the Metropolitan Railway and sell there different articles of food and drink as well as matches, tobacco, and cigars. Amongst the said articles is milk. The premises were not registered in accordance with the provisions of the said Orders.

The appellants are also tenants of many other premises of a similar character in London. For the purposes of obtaining milk for the same they entered into a contract with Messrs. Faulks & Sons, of 129, Jermyn Street, who undertook to supply it guaranteed pure and to convey it to the appellants at such of the said premises and in such quantities as they might require. The milk is supplied to the Farringdon Street buffet by Messrs. Faulks & Sons by their own carts and in their own cans, which are afterwards when empty sent for and fetched away by them.

The quantity of milk supplied to the appellants at the Farringdon Street premises averages about four quarts daily, but of these two are used for cooking purposes, and one is consumed by the staff. The sale of milk by the appellants at the buffet is extremely small, amounting to about three or four glasses per week, and the takings by the appellants in respect of the same average about 4d. per week on a total sum of takings at the said buffet which averages about 50l. per week. Under no circumstances is milk sold for consumption off the premises, but it is never refused when asked for for consumption on the premises.

The appellants are registered in Bermondsey in respect of their refreshment rooms at London Bridge Station and also in Marylebone, but are not registered in respect of their refreshment rooms elsewhere. At their premises in Farringdon Street Station a notice is published in the following terms:—"Messrs.

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Spiers & Pond Ltd. purchase all milk sold by them under a warranty of its purity and genuine quality and take all possible precautions to insure its supply to their customers in proper condition. But they are unable to guarantee it as either new, pure, or with all its cream and (to meet the requirements of the Sale of Food and Drugs Act) do not therefore sell it as such."

On the part of the appellants it was contended that upon these facts they did not carry on at the said premises the trade of a purveyor of milk within the meaning of the Order.

The magistrate was of opinion that the expression "purveyor of milk" in the Order meant a person who provided milk for and supplied it to persons wishing for it, and that the expression "following the trade of a purveyor" meant the providing and supplying of any commodity with a view to the making of a possible profit thereby. In this view the actual quantity so provided and supplied seemed to him immaterial.

Macmorran, K.C., and *Foà*, for the appellants. To bring the appellants within the provisions as to registration contained in art. 6 of the Order of 1885 it must be shewn not merely that they are purveyors of milk, but that they carry on the trade of purveyors of milk. Their trade is that of refreshment house keepers, and the selling of milk by them is merely incidental to that business; it is not a separate trade in itself. In *Emerton* v. *Hall* (1) the Court refused to hold that a milkman who sold a pennyworth of milk in a particular district thereby carried on the trade of a purveyor of milk in that district. The decision of the magistrate would apply to every tea shop in the kingdom, for no distinction can be drawn between selling milk by the glass and selling it to be mixed with tea; it would apply to every hotel, and even to a restaurant car or a railway train. Art. 13 of the Order deals with the precautions to be taken against infection and contamination by "purveyors of milk *and* persons selling milk by retail," drawing a distinction between the two classes. For the purposes of this case Faulks & Sons are the purveyors of milk, the appellants are the sellers by retail.

(1) (1910) 74 J. P. 301.

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[AVORY J. Does not sub-s. 6 of art. 6 of the Order suggest that where a person sells milk to people who are not his workmen or neighbours the fact of the quantity sold being small and of his carrying on some other business than that of a milk purveyor will not exclude the necessity of his registration?]

That sub-section was introduced to give statutory effect to the decision in *Southwell* v. *Lewis* (1), where a farmer for some years occasionally supplied a few quarts of milk to two dairymen living in the neighbourhood when they ran short of milk, and the Court held that that fact did not make the farmer a dairyman so as to require registration as such. It was not intended to enlarge the scope of sub-s. 1.

Danckwerts, K.C., and *Clarke Hall*, for the respondent. The question whether a person who sells milk carries on the trade of a purveyor of milk is a question of fact, and, assuming that there was evidence to support the magistrate's finding that he did, the Court will not interfere. Here there was abundant evidence on which he could so find. The appellants made a practice of selling milk to all their customers who wanted it. It was not an isolated transaction as in the case cited of *Emerton* v. *Hall*. (2) Moreover by putting up in their premises a notice as to the quality of the milk sold by them they held themselves out as making it part of their business to sell milk. The fact that they sold other things as well made no difference; a man does not the less carry on a particular trade because he carries it on as incidental to another trade. By registering themselves in respect of two other similar refreshment rooms they admitted that their business came within the terms of the Order. One of the objects of the Order is to prevent the spread of infection, and the necessity of preventing it applies to a refreshment room keeper as well as any other seller of milk, although perhaps in a less degree.

Macnaghten, K.C., in reply. The reason why the appellants registered themselves in respect of the two other refreshment bars was not that they thought there was any obligation to do so, but because they were requested to do it by the railway companies who were their landlords. The necessity of precautions

(1) (1880) 45 J. P. 206. (2) 74 J. P. 301.

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against the spread of infection is sufficiently provided for by art. 13. For that purpose registration is unnecessary.

LORD ALVERSTONE C.J. In my opinion this appeal should be allowed. The appellants have been convicted of carrying on the trade of a purveyor of milk at Farringdon Street Station without having been registered in accordance with the Dairies, Cowsheds, and Milkshops Order, 1885, as amended by the Order of 1886. The facts were that, having a refreshment buffet at the station, they purchased daily from a milk dealer for the purposes of that business about four quarts of milk, of which they sold not more than three or four glasses to customers. It was contended for the respondent that upon those facts there was sufficient evidence to enable the magistrate to find as a fact that the appellants were carrying on the trade of a purveyor of milk, and that he having so found we could not interfere. But in my opinion the magistrate misdirected himself as to the meaning of the words "purveyor of milk" and the class of persons that they were intended to cover. He has practically held that everybody who sells a glass of milk for profit is a purveyor of milk. Now, looking at the Contagious Diseases (Animals) Act, 1878, and the Order made under it, I cannot come to any other conclusion than that the expression "carrying on the trade of a purveyor of milk" means what it would be ordinarily understood to mean and was intended to apply only to persons who could reasonably be said to make a trade of selling milk. The Act says by s. 34 that the Privy Council may make such orders as they think fit for the following purposes:—"For the registration with the local authority of all persons carrying on the trade of cowkeepers, dairymen or purveyors of milk." Those three classes of persons being grouped together, it is to my mind impossible to hold that the last-named class was intended to include everybody who sold a glass of milk. Orders may also be made "For securing the cleanliness of milk stores, milkshops, and of milk vessels used for containing milk for sale by such persons"; "For prescribing precautions to be taken for protecting milk against infection or contamination"; and "For authorising a local authority to make regulations for the purposes aforesaid." I do

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not suggest that under that authority regulations may not be made for securing the cleanliness of the vessels in which milk is sold which would apply even to such a case as that of the appellants; but the only question that we have to decide is whether the appellants are required to be registered as carrying on the trade of purveyors of milk. When we come to the Order of 1885 the same classification obtains in art. 6, sub-s. 1, which provides that "It shall not be lawful for any person to carry on in the district of any local authority the trade of cowkeeper, dairyman, or purveyor of milk, unless he is registered as such." I repeat that that cannot mean that it shall be unlawful for any one to sell a glass of milk without being registered. Then if one considers art. 13 I think it is abundantly clear that it was not intended that the provisions as to registration should apply to persons merely selling a glass of milk, because after giving the local authority power to make regulations for the inspection of cattle in dairies, for regulating the cleansing, draining, and water supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen, and for securing the cleanliness of milk stores, milkshops, and all vessels used for containing milk for sale by such persons, it further empowers them to make regulations "for prescribing precautions to be taken by purveyors of milk and persons selling milk by retail against infection and contamination." There it has, as regards one necessary precaution, enlarged the subject matter with respect to which the local authority may make regulations, that is to say, it deals with the precautions to be taken by all persons selling milk by retail as well as by purveyors of milk. The Order draws a distinction between the class of milk sellers who are to be registered and those who are only required to take precautions against contamination or infection.

CHANNELL J. I agree. In this Order a purveyor of milk is contrasted with a person selling milk by retail, and there cannot be the slightest doubt within which of those two classes the present case comes. All the mischief that might arise from the contamination of milk in such a place as this refreshment room is provided for without its being necessary for the owners to be registered under the Order in respect of it.

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AVORY J. I am of the same opinion. I have been a good deal troubled with the suggestion that this may be a question of fact in each particular case, and in the case of *Emerton* v. *Hall* (1) this Court upon that ground upheld the magistrate, who found as a fact that the evidence there was not sufficient to shew that the respondent was carrying on the trade of a purveyor of milk in a district in which he was not registered. But here I have come to the conclusion that the magistrate misdirected himself. The title of the Order which we are construing is The Dairies, Cowsheds, and Milkshops Order, and in my opinion the expression "purveyor of milk" in that Order was intended to apply to persons who kept dairies or milkshops, and it could not reasonably be said that the appellants in this case kept either one or the other. I agree with Mr. Danckwerts' contention that a person may carry on more businesses than one and may possibly be a purveyor of milk within this Order although he is selling other things as well, but in order to so constitute him the sale of milk must at least be a substantial part of the trade which he is carrying on, and in the present case it is obviously not so.

Appeal allowed.

Solicitors for appellants: *Stanley, Woodhouse & Hedderwick.*
Solicitor for respondent: *W. T. Ricketts.*

(1) 74 J. P. 301.

J. F. O.

THE KING *v.* BEESLY AND OTHERS, LICENSING JUSTICES OF BIRMINGHAM.

Ex parte HODSON.

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Oct. 16.

Licensing Acts—General Annual Licensing Meeting—New Off-Licence—Conditional Grant—Restrictions on User—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 14.

On an application for a new off-licence justices at a general annual licensing meeting have no power to grant a licence subject to conditions; but they may ascertain from the applicant whether he consents to restrictions, being reasonable and proper restrictions, upon the user of the proposed licence, and they may grant or refuse the licence unconditionally according as he consents or refuses to submit to the restrictions.

RULE NISI for a mandamus directed to the licensing justices for the city of Birmingham commanding them to hear and determine according to law the application of one Hodson for a new licence in respect of a certain house, No. 169, Church Road, Yardley, for the sale of beer to be consumed off the premises.

A rule nisi for a certiorari had also been obtained to bring up an order of the licensing justices for the purpose of having it quashed.

From the affidavit of the prosecutor the following facts appeared:—At the general annual licensing meeting held under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), for the county borough of the city of Birmingham on February 10, 1912, an application was made on behalf of the prosecutor to the licensing justices, being the borough licensing committee, for the grant to him of a new off-licence for the sale of beer in respect of No. 169, Church Road, Yardley. The prosecutor offered to surrender two on-licences to the satisfaction of the justices in the event of his application being granted. The application was opposed.

The licensing justices made a verbal order to the effect that the application of the prosecutor was granted subject to three conditions specified in a typewritten document which they handed down to the prosecutor's solicitor. These conditions were

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(i.) that the prosecutor should surrender two on-licences to the satisfaction of the justices; (ii.) that he should not sell beer before noon or after 10 P.M.; (iii.) that he should not carry on any other additional business except the sale of mineral waters and tobacco. The prosecutor consented to surrender the two on-licences; he did not object to giving an undertaking not to carry on any other business except the sale of mineral waters and tobacco. He did not consent to give the undertaking not to sell beer before noon or after 10 P.M.

On April 1, 1912, the justices for the city of Birmingham sitting as the confirming authority held a meeting for the purpose of hearing applications for the confirmation of licences granted at the general annual licensing meeting. Application was made on behalf of the prosecutor for confirmation of the licence free from the condition that beer should not be sold before noon or after 10 P.M. The confirmation was opposed. The confirming authority decided that they had no jurisdiction to consider the confirmation except subject to all the three conditions, and made a verbal order to the effect that the licence was confirmed subject to the same conditions as had been imposed by the licensing justices. They declined to remove the restriction upon the sale of beer or to vote upon the desirability of imposing the conditions. The prosecutor was unable to obtain a licence except subject to the restriction aforesaid.

The licensing justices in their affidavits stated that as the result of their experience and knowledge of the district they were of opinion that the licence the subject of the prosecutor's application was not required to supply any public want in the district except between the hours of 12 noon and 10 P.M., and that the sale of beer during the hours before noon under off-licences instead of being a public convenience was a serious public injury and drawback; that they decided to grant the application if the prosecutor was willing to give the required undertaking; that by this they meant that if the undertaking was given the licence was to be deemed to have been granted, but that if the undertaking was not given the licence was to be deemed to have been refused; that at the licensing meeting counsel for the prosecutor was unable to state whether the prosecutor would be willing to give the

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undertaking: that if the prosecutor had stated that he would not or could not give the undertaking the justices would have refused the application. They further stated that it had been the practice for many years to grant new licences upon conditions or undertakings either indorsed upon the licence or provided for by a separate undertaking in writing.

The chairman of the confirming authority stated that the authority had not considered the question whether, if the undertaking were not to be given, they would think fit to grant the application for confirmation.

Rules nisi having been obtained as aforesaid on the ground that under s. 14 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), there was no power to impose conditions upon the grant of an off-licence,

Danckwerts, K.C., and *R. M. Montgomery* shewed cause. The justices have refused this licence. They have specified the only terms on which it will be granted. Those terms have been refused. To refuse a thing except upon terms which are not accepted is to refuse unconditionally. The grounds on which they refused are well within their jurisdiction and were properly taken into account: *Reg.* v. *County Council of West Riding of Yorkshire* (1); *Reg.* v. *Sheerness Urban District Council* (2); *Oldham Justices* v. *Gee*. (3)

Hugo Young, K.C., and *H. H. Joy*, in support of the rules. The justices have not refused this licence. If the applicant chooses to conform to the restrictions he may have the licence now. That is not a refusal. Neither have the justices granted the licence. They have said that the applicant may have a licence if he will give an undertaking. That is not a grant. The objectors are entitled to have a final decision either granting or refusing this licence according to law: *Reg.* v. *Bowman*. (4) There is no power to annex conditions to the grant of an off-licence as there is in the case of an on-licence by s. 14 of the Licensing (Consolidation) Act, 1910. If the course taken by the justices were upheld there would be no end to the varieties of tenure of

(1) [1896] 2 Q. B. 386.
(2) (1898) 62 J. P. 565.
(3) [1902] 86 L. T. 389.
(4) [1898] 1 Q. B. 663.

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off-licences, which were intended to be uniform in the terms and conditions on which they are held. The justices ought either to have granted the licence unconditionally or refused it unconditionally. In the present case they have done neither.

LORD ALVERSTONE C.J. The rule for a mandamus must be made absolute; but the rule for a certiorari must be discharged. The only record in the case is a list of conditions subject to which the licence was granted if indeed it was granted at all, as to which there is some doubt. Either the justices made a conditional grant of the licence, which they had no power to do, or they have given no decision at all. In either case there has not been a hearing and determination according to law. Their proper course would have been to ascertain from the applicant whether he was ready and willing to comply with such conditions as they thought right to impose, and there and then unconditionally to refuse the licence if he declined to accept, or grant it if he agreed to accept, those terms. In the present case the licence was opposed and the opposing parties are entitled to have the case decided according to law. They may persist in their opposition and contend that the licence ought to be refused even though the applicant is prepared to comply with the conditions offered by the justices. It was contended that a conditional grant was equivalent to a refusal if the conditions were not agreed to, but to accede to that argument would be to countenance the granting of conditional off-licences, which I am not prepared to do. At the same time I by no means say that justices are not entitled to ascertain what restrictions an applicant is willing to submit to, and in granting or refusing an off-licence to take into consideration the hours at which it is proposed to keep the house open. But the licence must be either granted or refused simpliciter by the justices, and as this has not been done the rule must be made absolute for a mandamus.

CHANNELL J. I agree. I think on the facts that there was no concluded hearing. The justices merely intimated what their views would be in either of two events, namely, that if the

applicant gave an undertaking they would grant the licence and that if the applicant did not give the undertaking they would refuse the licence. That is not in my opinion a final determination any more than if they had adjourned the hearing and withheld the licence until the applicant should signify his assent to the required undertaking. If that is in substance what has happened, there has been no concluded hearing. If on the other hand the licence has been granted only on conditions, that is not a grant according to law. In either view the rule for a mandamus must be made absolute. I agree that justices may ask for an undertaking upon a relevant matter for the purposes of considering whether they will grant or refuse the licence, but not for the purpose of attaching a condition to the licence. It would have been good ground for refusing this licence that it was only required during a portion of the day and that a full day licence was not necessary for the wants of the neighbourhood. The hours at which the house is to be open is certainly therefore a relevant matter on which the justices might reasonably demand an undertaking. But such an undertaking would not be legally a part of the licence so as to be punishable if it was broken. There is no power to annex a condition or undertaking to an off-licence.

AVORY J. I agree with some hesitation because I think the matter is merely one of form and that the rehearing will be of no benefit to the parties directly interested in the determination. It is quite lawful for justices to take into consideration an undertaking which the applicant is prepared to give that the house shall not be open between any particular hours. It is only because they have not stated whether they grant or refuse the application that I think the mandamus must go.

Rule absolute for mandamus.

Solicitors for prosecutor: *Godden, Son & Holme, for Alfred Caddick, Birmingham.*

Solicitors for justices: *Sharpe, Pritchard & Co., for C. & Carter, Birmingham.*

W. H. G.

C. A.

1912

June 25;
July 25.

[IN THE COURT OF APPEAL.]

IRWIN *v.* WATERLOO TAXI-CAB COMPANY, LIMITED.

Master and Servant—Negligence of Servant—Scope of Employment—Servant acting under unauthorized Order of General Manager—Liability of Master.

The defendants were the proprietors of taxi-cabs which they let out on hire. By an agreement with one of their customers one of their cabs was appropriated to his exclusive use. A driver in their employment, by the order of their general manager, whose orders it was the duty of the driver to obey, drove him in that cab upon his private business. The general manager had no authority to use the cab for that purpose, but the driver had no reason to suppose that his order was an improper one. The plaintiff was injured by the negligence of the driver while driving the cab:—

Held, that the driver was acting within the scope of his employment while so driving the cab, and that the defendants were liable for his negligence.

Appeal of the defendants from the verdict and judgment at the trial before Pickford J. with a jury.

This action was brought by the plaintiff to recover damages for personal injuries sustained by him in consequence of the negligence of the defendants' servant, Bird, while driving a taxi-cab. The defendants carried on business as the proprietors of taxi-cabs; one Black was their general manager, and Bird was employed by them as a driver, whose duty it was to obey the orders of the general manager. In pursuance of the orders of Black, Bird drove him in a taxi-cab of the defendants to see his private friends and not upon any business of the defendants. Black had no authority from the defendants to use any of their taxi-cabs in this way. The defendants had agreed with one of their customers that he should have the exclusive use of this taxi-cab for a specified period which was still current. Bird had no reason to suppose that Black was acting improperly in ordering him to drive him in this taxi-cab on the occasion in question. While Bird was thus driving Black the plaintiff was injured owing to his negligent driving.

At the trial the jury found a verdict for the plaintiff with 350*l.* damages, and judgment was entered for the plaintiff.

The defendants appealed.

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HOLLIS v. VAUXHALL MOTOR CAB COMPANY, LIMITED.

E. Shortt, K.C., and *T. C. P. Gibbons*, for the appellants. Upon the facts of this case it is clear that the defendants' driver was not engaged on their business or acting within the scope of his employment at the time of the accident. The master is not liable for the negligence of his servant unless he is acting within the scope of his employment, and it is not correct to say that every act done for the interest of the master is done in the course of the employment: *Limpus* v. *London General Omnibus Co.* (1) The question is whether the servant was in fact acting within the scope of his employment, not whether he thought or was entitled to think that he was so acting. Assuming here that the driver was entitled to think that the order of the general manager was a lawful order which he ought to obey, that could not affect the fact that the driver was not acting for the purposes of the defendants and in the course of his employment: *Storey* v. *Ashton*. (2) The driver's contract of service with the defendants was only that he should do their business, and they can only be liable for his negligence when he is doing their business, and not when he thinks, even properly, that he is doing it.

This cab, having been let on hire for a period to a customer, was not at the time the defendants' cab to be driven for them by this driver.

Clavell Salter, K.C., and *Tindale Davis*, for the respondent. This driver was employed by the defendants to drive a cab for them, and, if under an ostensibly lawful order from their general manager he drives one of their cabs, he is with regard to third parties acting within the scope of his employment and the defendants are responsible for his negligence. Here the driver was acting as the defendants' servant and it is immaterial what the general manager was doing. Upon the facts the plaintiff made out a prima facie case that the driver was acting within the scope of his employment and the jury were entitled to find a verdict in his favour. The defendants were the owners of this cab, which was on their premises; this driver was employed to drive for them; the general manager was his superior officer, whose orders he was bound to obey; and he was acting in obedience to such an order, which was not apparently

(1) (1862) 1 H. & C. 526, 542. (2) (1869) L. R. 4 Q. B. 476.

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unlawful. The driver, therefore, as regards the public, was acting within the scope of his employment by the defendants: *Joel* v. *Morison* (1); *Sleath* v. *Wilson* (2); *Mitchell* v. *Crassweller*. (3) "Generally speaking, the master is answerable for the negligent doing of what he employs his servant to do": per Mellor J., *Storey* v. *Ashton*. (4) [*Murray* v. *Currie* (5), *Rourke* v. *White Moss Colliery Co.* (6), and *Beard* v. *London General Omnibus Co.* (7) were referred to.]

Shortt, K.C., in reply. The opinion expressed in *Sleath* v. *Wilson* (2) was disapproved of in *Storey* v. *Ashton* (8), where Cockburn C.J. stated the true rule to be that "the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

Cur. adv. vult.

July 25. The following judgments were read:—

VAUGHAN WILLIAMS L.J. This is a case in which one Black, the manager of a yard in which taxi-cabs were let out on hire, acting not in the interest or for the benefit of his masters, the proprietors of the yard, ordered one Bird, a driver whose duty it was to obey Black's orders in respect of driving the taxi-cabs, to drive him to some destination for his (Black's) personal pleasure or convenience, to effect some purpose of his own. Bird carried out this order and drove Black in the cab to the named destination. In the course of that drive the accident in respect of which this action is brought occurred. Bird had no knowledge that the order which Black gave him was an order which Black had no right to give. As a matter of fact the taxi-cab in which Black went to see his friend, and which Bird drove, was a cab in respect of which the company had entered into an agreement with one Graham Harding, giving him the exclusive use of the said cab. The said cab had been specially fitted for the said Graham Harding, and the said agreement was subsisting at the time of the matters in question in this action.

(1) (1834) 6 C. & P. 501.
(2) (1839) 9 C. & P. 607.
(3) (1853) 13 C. B. 237.
(4) L. R. 4 Q. B. 476, 480.
(5) (1870) L. R. 6 C. P. 24.
(6) (1877) 2 C. P. D. 205.
(7) [1900] 2 Q. B. 530.
(8) L. R. 4 Q. B. at p. 479.

There can be no doubt that Black was not, in this transaction, acting as his masters' servant. Prima facie, therefore, apart from any duty of the driver to his masters to obey Black's orders, the defendant company would not be liable to the plaintiff for the accident occurring to the plaintiff during the drive through the carelessness of the driver acting under the orders of Black. Does it make any difference that Bird as the servant of the company was bound to obey the orders of Black? Can the plaintiff, a stranger, say Bird obeyed Black's orders because it was as their (the company's) servant he came under the obligation to obey Black? This is not a case in which the plaintiff could say, "You the defendants had by prior practice held out Bird as your servant." It is not like the case of a master who has held out Bird as acting for him. Bird was never held out to the plaintiff in any capacity.

The case of the plaintiff must be: "Bird in driving was in fact acting as the defendants' servant: you told him, in respect of his duties as your servant in the taxi yard, to obey, as his orders, all the directions of Black." I think, therefore, that any defence which is founded on Bird not being a servant of the defendant company fails.

As to the defence founded upon the car not being at the disposal of the defendant company because it was, at the time of the accident, by agreement, appropriated exclusively to the use of one Graham Harding, and specially fitted for the said Graham Harding, I do not think this affords a defence. The servant of the defendant company, by a direction conveyed to him by the manager whose directions it was his (Bird's) duty to the defendants to carry out, did drive this car on the day the accident occurred. I do not think that this prevents Bird, in driving, being a servant of the defendant company, since Bird drove in pursuance of the direction of Black, whose direction he (Bird) was by his duty to the defendants bound to carry out unless there was something about the direction of Black which would make a reasonable man doubt the authority, which is not the case here.

I think this appeal must be dismissed.

FLETCHER MOULTON L.J. In this case the plaintiff sues for damages for injuries occasioned by the negligence of a servant

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in the employment of the defendant company when driving a motor car. The employment, the negligence, and the amount of the damage are admitted. The sole question is whether under the peculiar circumstances of the case the defendant company is liable for that negligence. The jury have found a verdict for the plaintiff, and therefore the question before us is whether there was evidence which justified that finding.

The defendants are a company which carries on the business of letting out motor cars for hire. Their general manager was a man named Black, who was in the car at the time of the accident. Bird, the driver of the motor car, was in their employment, and there was evidence which justified the jury in coming to the conclusion that driving was a part of his duties. He was, of course, under the orders of Black as general manager, and therefore the jury were entitled and, I think, bound to find that at the time of the accident Bird was driving the car as servant to the defendant company to the knowledge and by the direction of Black, whose orders in such matters he was bound to obey.

The ground on which the defendants contest their liability is that Black was guilty of a breach of duty in thus ordering Bird to drive him in the motor car. They say, in the first place, that Black was driving to see a private friend and not on the business of the company, and that he had no right to use the car for such purposes without previously providing for the fare. In the second place, they say that Black had no right to make use of that particular car because the defendant company had contracted with a customer to give him the exclusive use of it. There is evidence to support both these allegations and they must be taken to be facts. At the same time there is no evidence that Bird knew anything about these matters, and the jury were justified in finding that he was wholly unaware that Black was acting improperly in ordering him to drive him.

I may at once get rid of the latter of these points. There is nothing in the evidence which would require the jury to regard the contract as amounting to a demise of the car or even justify them in so regarding it. It was merely a contract to give the customer the exclusive use of the car for a certain period. The

car still belonged to the defendant company and remained in their possession and under their control, and Bird was bound to obey Black's orders with regard to this car precisely as he was bound to obey his orders with regard to other cars belonging to the defendant company and used in their business.

Under these circumstances I am of opinion that Bird was acting within the scope of his employment and under the orders of his masters, the defendant company, when he was guilty of negligence. If a master directs a servant to take his orders in respect of matters within his contract of service from A. B., such orders, when given, become the orders of the master. A master can always delegate his authority and he does so when either expressly or impliedly he designates a person as authorized to give orders for him and on his behalf. In the present case the fact that Black was the general manager implied that it was the duty of a servant in the position of Bird to obey the orders given to him in the ordinary matters of his service. His driving the car on this occasion was thus in fulfilment of his duty of obedience to his masters, the defendant company, and therefore he was at the time their servant doing what he was engaged upon by their orders. Nothing more than this is needed to make the principle respondeat superior apply.

A little consideration will make it clear that the contrary view would not only be unjust but would lead to endless confusion. Suppose that the general manager of a railway company wires orders to a stationmaster to send a special train to a certain station and in going there it runs over a member of the public by the negligence of the servants of the company. Could the company be allowed to raise as a defence that the general manager gave the order improperly, say, because he intended to use the train for his private ends? For the convenience, I might even say for the necessities, of working its system, the company orders all its servants to obey implicitly the orders of the general manager, and therefore in obedience to the command of the company itself all its staff and plant are at his orders. If the company takes the advantage of this arrangement, it cannot say that one of its servants who in matters appertaining to his service obeys an order of the general manager is doing

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otherwise than obeying an order of the company itself. An accident happening to the servant under such circumstances would unquestionably be an accident arising out of and in the course of his employment and would entitle him to compensation, and conversely a negligent act by him, which caused damage to a third party, would be done in the course of his employment in carrying out his master's orders and the master must bear the consequences of it.

For these reasons I am of opinion that the judgment appealed against was right and that this appeal must be dismissed.

BUCKLEY L.J. I agree, for the reason that Bird when the accident occurred was acting as the defendants' servant and none the less because he was obeying an order which Black had no business to give him. Black did give him the order and Bird was by the defendants' directions bound to obey the order.

Appeal dismissed.

Solicitors for plaintiff: *Johnstone & Wiley.*
Solicitors for defendants: *Simpson, Thomas & Clark.*

W. J. B.

[IN THE COURT OF APPEAL.]

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LINGKÉ *v.* MAYOR, &c. OF CHRISTCHURCH.

Local Authority—Work executed under Statutory Authority—Obstruction of Access to House and Shop—Right of Occupier to Compensation—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

The mere temporary obstruction of access to premises, causing considerable inconvenience and loss of business to the occupier, may constitute "damage" in respect of which he is entitled to claim compensation under s. 308 of the Public Health Act, 1875.

Herring v. *Metropolitan Board of Works* (1865) 19 C. B. (N.S.) 510, distinguished.

Per Fletcher Moulton L.J.: *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 510, should be treated as overruled.

Appeal of the plaintiff from the decision of a Divisional Court (Darling and Bucknill JJ.) dismissing an appeal from the judge of the Southampton County Court.

The facts, as they appeared from the proceedings in the county court, supplemented by admissions of counsel, were shortly as follows.

In the autumn of 1910 the defendants, acting as the urban district council, and in pursuance of powers conferred upon them by the Public Health Act, 1875, made a scheme for draining the borough of Christchurch. Mrs. Lingké, the plaintiff, was the occupier of a house and shop, in which she carried on the business of a furniture dealer, situate in Bridge Street, Christchurch. The locality of the shop was peculiar, for it was situated between two bridges over different branches of the river, and therefore lay very low. The house and shop abutted upon the highway, and the plaintiff was in the habit of going in and out at her own free will. The defendants began their works in this particular spot on September 20, 1910, and the works were not finished until the month of January, 1911. The street at this particular spot was very narrow, and, as it lay very low, the carrying out of the works was a matter of some difficulty; it involved the laying of an air main under the pavement, which was kept open for a long time, the laying of a main drain within a foot of the kerbstone with a manhole to it, and the making of a kind of

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pumping station or ejection chamber on the other side of the road for the purpose of raising the sewage from the lower to a higher level in order to dispose of it. Bridge Street was the only outlet from Christchurch on that side of the town, and it was therefore necessary that it should be kept open for horses and carriages. The defendants' workmen could not throw into the road the soil excavated for the purpose of laying the drain; they therefore threw it up against the plaintiff's house and shop, thereby stopping access to them. It was not absolutely impossible, by a process of climbing and by indulging in certain gymnastic feats, to obtain access to the plaintiff's house and shop, but she was deprived of ordinary access to her house for about three months, during which time, if she bought furniture, it could not be delivered to her, and if she sold furniture, it could not be delivered to her customers. The plaintiff claimed compensation from the defendants in respect of the interrupted access to her premises, and appointed an arbitrator under the provisions of the Public Health Act, 1875, to assess the amount of compensation. (1) The corporation failed to appoint an arbitrator, but eventually agreed that the arbitrator appointed by the plaintiff should act for both parties. The arbitrator made an award in favour of the plaintiff for 23*l.* 7*s.* 10*d.* damages. The defendants disputing their liability to the plaintiff, the present action was brought on the award in the county court. The county court judge, holding that the case was governed by *Herring* v. *Metropolitan Board of Works* (2), gave judgment for the defendants and his decision was affirmed by the Divisional Court (Darling and Bucknill JJ.). The plaintiff appealed.

Glen, K.C., and *G. W. Bailey*, for the plaintiff. It is not disputed that, in order to entitle the plaintiff to compensation under

(1) By s. 308 of the Public Health Act, 1875 (38 & 38 Vict. c. 55), "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, ..."

(2) 19 C. B. (N.S.) 510.

s. 308 of the Public Health Act, 1875, she must have suffered damage which, but for the powers given to the local authority by the Act, would have been an actionable wrong. What the defendants did in this case would, apart from their statutory powers, have been clearly an actionable wrong, and, if done by any person or body other than the local authority exercising the powers of the Act, would have given to the plaintiff a good cause of action against that person or body for damages. This case does not come within the principle of such decisions as *Herring* v. *Metropolitan Board of Works* (1) and *Ricket* v. *Metropolitan Ry. Co.* (2) In this case there was a direct actual interference with the access to the plaintiff's premises; in those cases the damage was too remote, there being no actual damage to the plaintiff's premises themselves, but only loss of trade or inconvenience occasioned by a certain amount of obstruction to the street. In *Ricket* v. *Metropolitan Ry. Co.* (2) the question was whether there had been an injurious affection of the premises. It is not every obstruction to a street which will constitute an actionable wrong to a person occupying premises in the street. A certain reasonable amount of obstruction and consequent damage or inconvenience to occupiers therein may be caused by building operations or street repairs without giving any cause of action to the parties damaged, but no one could doubt that depositing a great heap of dirt so as to obstruct the access to an occupier's premises in the manner in which the access to the plaintiff's premises was obstructed would, but for the powers given by the Act, constitute an actionable wrong. The exercise in a reasonable manner of a legal right, such as the right of the owner of premises to rebuild or repair them, or the right of a street authority to repair the street, does not constitute an actionable wrong, although occupiers in the street may be more or less inconvenienced and damnified thereby. The decision in *Herring* v. *Metropolitan Board of Works* (1) can only be supported on the footing that the Court thought that the obstruction there was not of such a character as would have amounted to an actionable wrong, if the defendants had been acting without statutory powers. There is abundant authority to show that a direct physical interference

(1) 19 C. B. (N.S.) 510. (2) (1867) L. R. 2 H. L. 175.

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with the access to premises, such as there was in the present case, constitutes an actionable wrong, and therefore will give a right to compensation if occasioned in the exercise of statutory powers: *Caledonian Ry. Co.* v. *Walker's Trustees* (1); *Fritz* v. *Hobson* (2); *Original Hartlepool Collieries Co.* v. *Gibb* (3); *Metropolitan Board of Works* v. *McCarthy* (4); *Reg.* v. *Wallasey Local Board.* (5) If *Herring* v. *Metropolitan Board of Works* (6) cannot be distinguished from the present case on the grounds already suggested, it is contended that it is contrary to the trend of subsequent authorities and should be treated as overruled. For the present purpose there is no valid distinction between permanent and temporary obstruction of the access to premises: *Ford* v. *Metropolitan and Metropolitan District Ry. Cos.* (7) The award of the arbitrator is conclusive as to the fact of damage: *Brierly Hill Local Board* v. *Pearsall.* (8) [They also cited *Beckett* v. *Midland Ry. Co.* (9); *Attorney-General* v. *Cambridge Consumers Gas Co.* (10); *Attorney-General* v. *Sheffield Gas Consumers Co.* (11)]

Macmorran, K.C., and *S. H. Emanuel*, for the defendants. The county court judge and the Divisional Court were right. There is no distinction between the facts existing in the present case and those which existed in *Herring* v. *Metropolitan Board of Works* (6), and the compensation clause in that case is not to be materially distinguished from the compensation clause here. That case has governed the practice of local boards for forty-seven years, and it is an authority for the proposition that every obstruction of a highway is not necessarily a nuisance. The plaintiff's claim is really a claim for injury to her business, and not for an injury to her house or property, but in a case arising upon a similar section under the Railways Clauses Consolidation (Scotland) Act, 1845, the House of Lords held that "in order to found a claim for compensation under this section, some special or peculiar damage must be done to the lands by reason of the

(1) (1882) 7 App. Cas. 259.
(2) (1880) 14 Ch. D. 542.
(3) (1877) 5 Ch. D. 713.
(4) (1874) L. R. 7 H. L. 243, 252, 260.
(5) (1869) L. R. 4 Q. B. 351.
(6) 19 C. B. (N.S.) 510.
(7) (1886) 17 Q. B. D. 12, 20.
(8) (1884) 9 App. Cas. 595.
(9) (1867) L. R. 3 C. P. 82.
(10) (1868) L. R. 4 Ch. 71.
(11) (1853) 3 D. M. & G. 304.

construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute": *Caledonian Ry. Co.* v. *Walker's Trustees*.(1) The damage is too remote within the principle laid down by Walton J. in *Anglo-Algerian Steamship Co.* v. *Houlder Line*.(2)

Glen, K.C., was not called on to reply.

July 11. VAUGHAN WILLIAMS L.J. It is common ground in this case that it is essential to the claim of the plaintiff that the claim should be in respect of a matter as to which if it had been done apart from statutory authority the claimant would have a good cause of action. So far as the arbitrator's decision is concerned we are bound by the quantum he has arrived at. The plaintiff in this case was deprived of the ordinary access to her house in which she carried on the business of furniture dealer. The counsel for the defendants has admitted certain facts. In making those admissions he meant merely to bring the facts of this case within the description of facts in the report of *Herring* v. *Metropolitan Board of Works*.(3) Still he did admit the facts stated in the course of his opening, and I must deal with the case on these admissions. The admissions as appearing in the learned judge's notes are these: "It is admitted that the defendants were at work for something like three months. The work was commenced on September 20, 1910, and was not actually completed within the year 1910, so that for all practical purposes they were at work for a period of three months, during some portion of which time the plaintiff was unable to get in and out of her house in the ordinary way. I do not say that it was absolutely impossible by a gymnastic process to do so, but they were deprived of the ordinary access to the house, and, what was of more importance, to the shop in which the plaintiff carried on her business as a furniture dealer; and not only were she and her customers prevented, but if she had bought furniture it could not be delivered, and if she sold it it could not be delivered to her customers." Upon these facts we have to ask ourselves

(1) 7 App. Cas. 259. (2) [1908] 1 K. B. 659.
(3) 19 C. B. N.S. 510.

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the question, whether this appeal succeeds or not. As to the first question, there again I am dealing with a proposition of law, and it is in substance common ground. Ask yourself the question, If no such statute authorizing this public body to construct this sewer had been passed and a sewer had been constructed by a private individual, would there have been a cause of action by Mrs. Lingké against the private individual so doing, and would she be entitled to recover damages of the nature claimed here? That being the question, I may say that I myself have no doubt if this had been done by a private individual she would have had a cause of action.

The case to which we are referred is the case of *Herring* v. *Metropolitan Board of Works*. (1) It is said that really this case decides that a private individual, if he had done work similar to that done by the Metropolitan Board of Works, would not in the circumstances of the case have been liable to an action. What is the ground of the decision? If I remember rightly, the actual interference with the rights and conveniences of the plaintiff which were alleged there were the erection of a hoarding described in paragraph 6; "against the upper end of the hoarding, and also on the side next the appellant's premises, bricks were stacked; and occasionally rubbish from the sewer, and sand, were deposited there. The distance the bricks and rubbish projected from the hoarding was stated by the witnesses for the respondents to be about eighteen inches, whilst those for the appellant estimated it to extend to five or six feet." That was the sort of obstruction which was complained of there: an obstruction of the highway interfering with the user of the highway by the claimant. What was decided there appears by the judgments of Willes J., Byles J., and Montague Smith J. I think it convenient to begin with the judgment of Byles J., because I think the judgment of Byles J. expresses in rather more precise language the same principle as is expressed by Willes J. Montague Smith J. went on the other ground. Byles J. begins by saying: "Though one of the judges who dissented from the conclusion arrived at by the Exchequer Chamber in *Ricket* v. *The Metropolitan Ry. Co.* (2),

(1) 19 C. B. (N.S.) 510. (2) L. R. 2 H. L. 175.

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I should be one of the first to bow to the authority of that decision." That means really that he accepts the proposition that you cannot get compensation unless the acts that you are complaining of would have given you a cause of action but for the passing of the statute under which a public authority are acting. Then he goes on: "The case, however, has no bearing upon the matter now in hand. I agree with my brother Wills that it is not necessary for us to say what the Legislature meant by 'damage.' My judgment rests upon this ground, that the injury here complained of, viz. the temporary obstruction of the public way, rendering the access to the appellant's premises more inconvenient for a short time, gave him no cause of action and no right to claim compensation." I may stop there for a moment: I do not think Byles J. meant to base his judgment upon the shortness of time, and I can only say that if he did it seems to me that it was a bad view to deal with this question of the right to compensation as depending on the length of time. I do not think he meant that. He goes on: "As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way; but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same." But when he says "an equally undoubted right for a proper purpose to impede and obstruct," Byles J. does not mean a right to do that which will constitute a legal obstruction either in the case of an action or in the case of an indictment, and that would appear from the instances he immediately cites. "Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, rebuilding or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances." Then he says: "If this be the right of private persons, a fortiori must it

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be the right of a public body to which extensive power is intrusted for the general good of all. On the ground, therefore, that the obstruction here was of a temporary character, and was done for a proper purpose, and not continued for an unreasonable time, I am of opinion that this is not a case for compensation under the Metropolis Local Management Act." I leave out that part of the judgment of Byles J. in which he relies upon the ground that the obstruction was of a temporary character, because, as I have already said, I do not think that this alone was the substance of his judgment. Although I say I leave it out I will say this: if it means only to assert the undoubted right of the subjects of the realm and everybody to use the road for private purposes, even though that, physically for a time or otherwise, obstructs temporarily the convenient access for the public user, I have not a word to say against it; but if it means that the fact that the obstruction is for a short time necessarily makes it the subject-matter which a Court of law would deal with on the basis of the maxim de minimis I do not agree with it. But I do not think it means that. Here he says: "On the ground, therefore, that the obstruction here was of a temporary character, and was done for a proper purpose, and not continued for an unreasonable time, I am of opinion that this is not a case for compensation under the Metropolis Local Management Act." I do not think as far as the words of the judgment are concerned I have anything to say against it. I am told it is over forty-seven years since that case, and so far as the principle of the decision is concerned I have not a word to say against it. Of course, the decision really involves this proposition: that such a physical obstruction as there is here would not have given any cause of action because it is a matter falling within what Byles J. calls the "equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same." I do not think that by proper purpose he means there a purpose authorized by statute. What he means is that the King's highways are made for the use and convenience of the subjects. There would be none on the highways if every obstruction of the highways constituted a legal obstruction. But if the user that you are making is of such a character that the people generally

who use that road will find it necessary to do this, that, and the other, whether it is to stop for a time on the highway, or any of the other matters which are mentioned by Byles J. in his judgment, this is no legal obstruction. You must remember those instances begin with carts and waggons stopping at the doors of shops and warehouses. Then he takes coal-shoots; then he takes what to my mind is a very much wider instance but equally true: "So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way." These are the sort of things that it is recognized people may do in respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action. Willes J. in substance arrives at the same conclusion. He says in one part of his judgment (1) this: "In other words it appears to me that, the construction of the hoarding being necessary for the due performance of the works by the board, and the obstruction not having been more than was necessary or kept for an unreasonable time, would give the appellant no cause of action, and consequently no claim for compensation under the Act. Upon that short ground, I am of opinion that the decision of the magistrate was right, because damnum must mean cum not sine injuria. It would clearly be sine injuria to erect a hoarding to an extent and for a period not unreasonable. As Mr. Raymond well observed, those temporary inconveniences must from time to time occur everywhere; and if an action would lie against the Metropolitan Board of Works each time a sewer is opened for repair, the burthen would be intolerable. Individuals must be content to bear these small inconveniences in consideration of the general benefit to the public." I do not think Willes J. means anything different from Byles J. They are both of them speaking of the users which are recognized, although physical obstructions, as not being obstructions in the eye of the law.

I am under no necessity, according to my own view of this case, to overrule or to dissent from the judgment of the Court of Common Pleas in that case. I have only to ask myself how far

(1) 19 C. B. (N.S.) at p. 324.

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this principle is applicable in this case. I adopt the principle: I accept it. I mean I accept the principle that every physical obstruction of a highway does not constitute an obstruction in the eye of the law. Putting it shortly, those obstructions which are absolutely necessary for the convenient and safe user of the highway are not deemed by the law to be obstructions of the highway for the purposes of indictment or for the purposes of the individual cause of action. All that was held there as not an obstruction was the hoarding, which I have already pointed out, I think, in the course of the discussion, when a house is being pulled down, is essential for the protection of the public, for the protection of the King's subjects who are using the King's highway; and you should put up such a hoarding as will prevent the stones and other things, which often result in the course of road repairing or building a house, falling upon those who are using the King's highway. I ask myself the question: If this sewer had been dug and these acts which are the subject of the allegation at the trial had been done by a private individual, would or would there not have been a good cause of action against the defendants? The act of digging this sewer is an act which, if it had been done by a private individual, would to my mind (to the extent that if it really caused damnum within the meaning of the Act of Parliament which we have no doubt to deal with) have given a cause of action. It is said, "Oh, but it gives no cause of action here because the digging of this sewer is authorized by statute." I know that, but it does not seem to me to be material to take that into consideration, and I am asking myself this question: I am accepting, and everybody has accepted, the view established by *Ricket* v. *Metropolitan Ry. Co.* (1), that in order to entitle to compensation under the Lands Clauses Act you must shew that the act done was an act which, if it had been done by an individual, would have given a cause of action. Is that so in this case? My answer is that it clearly and plainly would have given a cause of action against him. I do not think that such a matter in any way falls within the instances of user on the highway which are given by Byles J. which are physical obstructions of the highway,

(1) L. R. 2 H. L. 175.

or which are justified, because the public could not use the highway unless the authority was allowed such user without liability by indictment or cause of action.

But when I come to deal with this sewer which is made in the public street I find that the making of that sewer is entirely dependent upon the statute. In those circumstances I think that this instance in no way falls within the principle of the cases mentioned by Byles J. in detail and by Willes J. in general words, in which the physical obstruction is in law not treated as an obstruction.

I have only one word to add here, and it is this: I think in the course of the argument there was a little confusion arising in this way: you must always take into consideration what it is that in fact the statutory body is doing. I take it that in this particular case the claimant is not complaining of anything that was done to her house physically. I do not know that the pavement in front of the house, and the soil under it, were hers or not, but I am dealing with this case upon the basis that she may or may not have had the ownership of the soil. In this particular case I do not think it makes the least difference. I have only made that last observation because I do not want it to be supposed generally that I think it makes no difference whether the matter complained of as obstruction is a matter which took place in the execution of a statutory duty. I am dealing with this case as it affects the body under the statutory authority who dug the whole trench of the road and then placed this in front of the house so as to obstruct access to customers coming in, and the delivery out by the plaintiff of goods. In that respect the claimant has sustained injury beyond that which any of the people with houses abutting upon this highway have suffered.

I think this appeal must be allowed, and with costs.

FLETCHER MOULTON L.J. In my opinion the decision of the question before us is not a matter of difficulty excepting in one respect. I feel bound to admit that in my opinion there is no material difference between the facts of this case and the facts of *Herring's Case* (1), to which so frequent references have been

(1) 19 C. B. (N.S.) 510.

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made in the course of the argument before us, and that therefore the decision of this Court will have the effect of overruling that case. It was decided I think in 1865, and has so far as I know neither been commented upon nor doubted by any Court. I feel great responsibility in coming to a conclusion that overrules a decision that has stood unchallenged for so many years; especially when one sees who were the judges who were engaged in it. But that case was decided before the decisions were given in the House of Lords which have shaped the modern interpretation of the clauses which relate to compensation under the Lands Clauses Act and other similar Acts; and as we are bound to follow those later cases, I think that we must not shrink from giving a decision which overrules so old a decision as the one in *Herring's Case.* (1)

In the present case the appellant was possessed of a house in a street which she used for the purpose of a furniture shop. The defendants had statutory powers to make and repair sewers, and in the exercise of their powers they commenced works for laying down a drain in the street before the plaintiff's house. In the course of those works they not only broke up the surface, but laid piles of earth and materials close in front of her house, and to judge from the photograph which was put in (at which we were entitled to look) those heaps of rubbish and materials must have actually blocked up the exit from her house into the street and practically made her house inaccessible to people passing along the road who would otherwise have come close up to her front door and shop. This lasted not for a day or two, so that it could come under the rule of de minimis, but for months. She made a claim for injurious affection, or damages, in respect of this interruption to the access to her house. It was referred in the usual way to an arbitrator to determine the quantum. He found that the loss was measured by the sum of 23*l.*, a sum which for premises of that character could not be said to be a small amount. But it is well-established law that the decision of an arbitrator as to quantum of compensation under public Acts, which grant compensation for damage by works, does not decide the question of liability, although it does decide the

(1) 19 C. B. (N.S.) 510.

quantum of compensation if liability be proved. The consequence was that the plaintiff brought an action in the county court to establish her right to compensation, it being common ground that if she established that right the judgment would be for the sum of 23*l.*

There was no dispute as to the facts of the case, which were as I have very briefly sketched out. But the learned judge decided against her claim. He says that the effect of the decisions is that a public body, so long as it is performing its statutory duties and so long as no act of negligence is proved against it and there is no improper conduct or unreasonable delay in the execution of the work, is not liable to pay compensation for the inconvenience caused by the execution of the work. In my opinion this statement of the law on which his judgment is based is erroneous upon two grounds. In the first place, if any negligence or undue delay were proved it would negative and not establish the right to compensation for damage so caused. It would shew the act to have been a wrongful act, damages for which must be recovered by action and not by proceedings for compensation. Secondly, it is not the law that if in the proper exercise of the statutory powers given to a public body for purposes like this damage is caused through the execution of the works, there can be no claim for compensation. It is quite true that in the long line of decisions (not consistent with one another in all cases) there was a time when it was thought that there was a fundamental difference between damage caused by temporary interference with property and the user of it and permanent interference. But since the case of *Ford* v. *Metropolitan and Metropolitan District Ry. Cos.* (1), which was decided in this Court in 1886, it has been settled law that the fact that an interference is only temporary and that it takes place during the construction of the works is not fatal to the right to compensation. Where the interference would give ground for compensation if perpetual, then if it is temporary, but not for a negligible time, it will also give ground for compensation. Therefore on both these grounds the principle on which the learned judge's judgment is founded is not in accordance with the law as now settled.

(1) 17 Q. B. D. 12.

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The appeal to the Divisional Court resulted in the judgment of the county court judge being supported, and substantially on the same ground. Each Court based its decision upon *Herring's Case* (1), and I quite agree that if *Herring's Case* (1) is good law those decisions were right. It follows therefore that it is necessary for me to examine *Herring's Case*. (1) As I have said, the facts in *Herring's Case* (1) were indistinguishable from the facts in the present case. There there were sewage works. It is true that the interference was somewhat more substantial. If I read the description rightly, a shed was made right across the carriageway of the street, and round the sides of that shed rubbish and materials were deposited which made the interference more serious in degree but not at all different in kind from that which existed in the present case. At that time it had not been clearly decided by the highest authority that in order that there might be a claim for compensation the act must be an act which if done by a private person would have inflicted an actionable wrong on the plaintiff. I think the judges in *Herring's Case* (1) differed from the law which has since been laid down in that respect, but whether they did or did not differ it is quite clear we must accept that as the law.

We have therefore to consider what is the law with regard to interference with a street by a private person. Suppose a private person puts heaps of rubbish in the street, breaks its surface, and digs trenches therein for any purpose whatever—and in my opinion it makes no difference what the purpose is—he is liable to indictment. He has broken up the surface of the highway. That is a nuisance, and he is therefore liable to an indictment at the hands of the public, and in the name of the public. But that is immaterial for the purpose of to-day. For the purpose of to-day the question is, has he committed an actionable wrong on the plaintiff? The law with regard to that is not in doubt. If there is a public right such as the user of a street and it is interfered with by an individual, that interference does constitute an actionable wrong and give a right to damages to those members of the public who can prove special damage therefrom, i.e., some damage flowing to them which does not flow to ordinary members

(1) 19 C. B. (N.S.) 510.

of the public. That damage must flow directly from the interference and not be a mere distant consequence of it. We have to ask, therefore, in this case, whether, apart from the fact that the defendants would have been open to indictment but for their statutory powers, the plaintiff would have been able to sue them in an action for damages. I consider that this interference with her premises by this obstruction was so direct and so individual and special that if it had been unauthorized she could have proved special damage because the exit to the street from her house and the access to her house from the street were so interfered with that the house was not capable of being occupied as conveniently as it had been before, and the difference between the two was substantial and not slight. Therefore I have no doubt that had this been done by unauthorized persons she would have had a right of action against them. That being so, it could only be justified by the statutory powers possessed by the defendants, and those statutory powers gave them a complete justification. But they take their statutory powers on certain terms, and one of the terms on which those statutory powers are given is that for that damage which they do, which would otherwise have been actionable, they must pay full compensation. Therefore the learned judge ought in my opinion to have said that the defendants were liable to pay full compensation for the damage that the plaintiff has suffered, and that compensation must be taken at the amount assessed, namely, 23*l*.

I do not intend to go minutely into the judgments in *Herring's Case*.(1) But I would point out that in my opinion Byles J., having stated that the normal user of streets is in a sense a partial and momentary obstruction of those streets, went on to deal with obstructions not arising from normal user at all, as though they were governed by the same rules. The public have a right to use the street as a street and not as a digging ground, and I cannot see what is the good of referring to the momentary interruptions of the street by a normal user. That has nothing to do with the interruptions of that street by the breaking up of the surface by digging. But detailed criticisms of the reasoning of the judges in *Herring's Case*(1) would profit little. It appears

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to me that the decision of the present case rests on the two principles which are now well settled, namely, that plaintiff succeeds if it can be shewn that the act, if it had not been rendered lawful by statutory powers, would have been to her an actionable wrong. Secondly, if that is the case, the mere fact that it only operates during the execution of the work is no bar to her receiving such compensation as that temporary interference with her rights justifies. For those reasons I think the appeal ought to be allowed with costs here and in the Courts below.

BUCKLEY L.J. In 106 *Law Times* at p. 376 is a report of this case before the Divisional Court. The head-note, after referring to s. 308 of the Public Health Act of 1875 (the section which relates to compensation in case of damage), states that the Court held under that section that a person who has sustained damage in consequence of the execution of work authorized by the statute is not entitled to compensation unless it is shewn that the local authority has acted negligently or unreasonably in the execution of their statutory powers. In my judgment that is a fair summary of that which the Court did hold. No one has contended before us that that proposition can be maintained. If by statute there is conferred on a body a power to do defined works, no one can say that the body doing those works is doing a wrong. The act may be one which would have been wrongful but for the statute, but inasmuch as the statute has authorized it it is not wrong, it is right. Therefore so far no one has been wronged. But the authority of the statute is not an authority to do those acts negligently. If therefore the body which has statutory authority to do the work does the work negligently, the body is liable for negligence as any one else would be liable for negligence. That, however, is not the proposition with which we have here to do. That proposition is not disputed, I understand, between counsel at all. What we have to do with here is this: the Christchurch Corporation was authorized by statute to do certain works. Under s. 308 of the Public Health Act, 1875, it is provided that if any person sustain damage by reason of the exercise of the powers full compensation shall be made to such person by the local authority exercising such powers. The

Christchurch Corporation did the works and in the course of doing them I will assume (I will come to the acts presently) that they did such acts as that, if they had not been authorized by statute, they would have been liable in damages to the person against whom they did them. They interfered with the highway and the means of access to the plaintiff's house in such a way as that but for the statutory authority there would have been nuisance and special damage to the plaintiff by reason of the interference with the highway. The question is whether under these circumstances, without finding that they have been negligent or have acted unreasonably in the exercise of their powers, compensation ought to be given to the plaintiff if the acts done are acts which would have given rise to a cause of action if there had not been the statutory power.

There is difficulty in ascertaining the facts of the case. I may say with very great deference to the county court judge that he leaves me without guidance as to the facts which he found. I do not think he found any facts. I think he thought erroneously that it was for the arbitrator, to whom this matter had gone on quantum, to find the facts on the question of liability. I need scarcely say that is not so. He referred to witnesses called before the arbitrator. He was not entitled to refer to those witnesses; they were not witnesses before him. He could not say as he did say that the question ought to be asked of the arbitrator. The judge is bound to ask it of himself and to answer it himself. The county court judge having left me without findings of fact I must go back to that which, by admission of the counsel for the defendants, was available as evidence against the defendants. The President has read the passage. The substance of it is that for a very substantial time, three months or more, there were such acts done as made it physically impossible without what are called gymnastic feats to get in or out of the plaintiff's house, and that as regards taking furniture in and out (and her business was that of a furniture dealer), if she bought furniture it could not be delivered to her, and if she sold it it could not be delivered to her customers. The question for decision here is whether the facts are such as that if the Christchurch Corporation had not had the statutory authority which

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they had but had done these acts there would have been a cause of action as against them by the plaintiff for nuisance and special damage to her by obstruction of the highway.

Mr. Macmorran very frankly confesses that his sheet-anchor in the case is *Herring* v. *Metropolitan Board of Works* (1) and that in the absence of that case he would have very great difficulty in sustaining the decision under appeal. I want to say quite shortly as a matter of law what *Herring's Case* (1) decided. It decided that a body which by a statute in which is contained a compensation clause is authorized to do defined works is not liable to pay compensation for any such acts done in the execution of the authorized works as would not have been sufficient to support an action for damages if those acts had been done by a private person. If that is all *Herring's Case* (1) decides, it seems to me it was quite right. But that is not the purpose for which it has been used before us. It has been used before us for this purpose: There were certain physical acts of obstruction of a highway in that case. The Court, it is said, decided that those physical acts of obstruction were such as that an action for nuisance by reason of those acts could not have been brought against one who had no statutory authority. If it decides that, in my opinion *Herring's Case* (1) was wrong. It is said that the acts of obstruction in *Herring's Case* (1) and the acts of obstruction in the present case are so strictly comparable as to make them for the present case identical; not in fact identical, but substantially identical; and I do not find any reason to quarrel with that. Of course I might point out differences, but they are not of substance; they are differences of detail. I do not feel myself bound by *Herring's Case* (1) to say—in fact I should be wrong if I did say—that such acts of obstruction as in this case, had they been committed by a person having no statutory authority, would not have been such as to give a right of action against that person for damages. So far as *Herring's Case* (1) would lead to a contrary conclusion it appears to me that *Herring's Case* (1) was wrong.

The true use of all decisions is to endeavour to ascertain the principle upon which the decision is based. The Court which

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looks at the decision for the purpose of being bound by it, or of following it if it is not bound by it, has to see what is the principle underlying it, and to apply that principle to a new state of facts. I cannot find in *Herring's Case* (1) any principle laid down by which I am bound to say that such acts of obstruction as there are in this case are not acts which raise a right of action if the acts had been done by a private person. I hold here that although the Christchurch Corporation had by statute a right to do that which they did, and although it was not shewn that they were negligent or unreasonable in doing that which they did, nevertheless the facts are such as that they did under the authority of the statute acts which the statute authorized them to do, but upon the terms that if they did them they should pay compensation for them. The whole matter may be briefly stated as follows: Notwithstanding the statute, the corporation is liable for negligence. Under the statute the corporation is by s. 308 liable to make compensation in any case in which the exercise of the statutory powers results in a state of facts which in the absence of the statutory powers would give a cause of action for damages.

On those grounds I think that the appellant succeeds, and there ought to be judgment for the appellant for the amount awarded, and that the corporation ought to pay the costs here, in the county court, and in the Divisional Court.

Appeal allowed.

Solicitors for plaintiff: *Williamson, Hill & Co., for D'Angibau & Malim, Boscombe.*

Solicitors for defendants: *Smith, Fawdon & Co., for E. H. Bone, Bournemouth.*

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W. J. B.

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July 29, 30.

WILLIAM PICKERSGILL & SONS, LIMITED *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Concealment—Assignment—Assignee for Value without Notice—Defence arising out of the Contract—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 50, *sub-s.* 2.

By s. 50, sub-s. 2, of the Marine Insurance Act, 1906, where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

A firm of shipbuilders agreed to build a vessel for certain shipowners. As security for the purchase-money and in pursuance of a covenant to that effect the owners insured the vessel with certain underwriters and assigned the policy to the builders. Material facts known to the owners but unknown to the builders were not disclosed to the underwriters.

In an action on the policy by the builders as assignees of the policy against the underwriters, the latter pleaded the non-disclosure.

Held, that the non-disclosure of material facts, being a breach of a condition precedent to the liability of underwriters on a marine policy, was a defence arising out of the contract within the meaning of the above enactment, and available to the underwriters even against the claim of bona fide assignees for value of the policy who had no notice of the non-disclosure.

Trial of action before Hamilton J. without a jury.

The action was brought upon a policy of marine insurance executed by the defendants. The plaintiffs claimed as assignees or as persons entitled to an assignment of the policy.

By a contract made in September, 1909, the plaintiffs, a firm of shipbuilders, agreed with Messrs. Brown, Son & Co. to build for them a steel single-decked steamship, afterwards known as the *British Standard*, for a price to be paid as therein mentioned. As security for payment of the purchase price Brown, Son & Co. agreed on delivery of the ship to hand to the plaintiffs a first mortgage of the ship and an assignment of a good and approved policy of insurance on her hull and machinery.

In October, 1909, Brown, Son & Co. transferred the benefit of

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this contract to a trustee for a company about to be incorporated. The company was shortly afterwards incorporated as the British Standard Steamship Company, Limited, and adopted the contract.

The ship was completed and registered in the name of the company as owners. A statutory mortgage of the ship by the company to the plaintiffs was executed, and also a deed of covenant containing the following provisions:—The company agreed to indorse and deliver to the plaintiffs all policies of insurance then or thereafter effected in respect of the ship and her appurtenances; to keep the ship insured against loss or damage by perils of the sea or otherwise with such underwriters, clubs, and companies as should be reasonably approved of by the plaintiffs, with the right in the plaintiffs in default to insure the ship at the expense of the company; and to pay all premiums and calls which should become payable in order to keep such insurances on foot. And the company appointed the plaintiffs their attorneys for them and in their name to ask, demand, receive, sue for and recover all insurances which might become due or owing under the said indenture and to do such other acts and things in the name of the company or otherwise as might be necessary for the due enforcement of the security, and whatever the plaintiffs might do in the premises the company agreed to ratify and confirm.

In pursuance of these covenants a number of policies, including the policy sued on in this action, were effected by Brown, Son & Co. as managers and on behalf of the British Standard Steamship Company.

The policy in question was executed by the defendants on April 22, 1910, in pursuance of a slip underwritten on their behalf on January 21, 1910. By the terms of the policy the defendants agreed to make good all such losses and damages thereinafter expressed as might happen to the subject-matter of the policy and might attach to the policy in respect of the sum of 1698*l.* thereby insured, which insurance was declared to be

upon hull and materials valued at . 20,000*l.*
„ machinery and boilers „ „ . 12,000*l.*
Clauses and warranties as attached

of the ship or vessel called *British Standard* 184 for and during

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the space of twelve calendar months beginning noon April 16, 1910, and ending noon April 16, 1911. The adventures and perils insured against included perils of the seas. The policy was not formally assigned to the plaintiffs, but by the direction of the British Standard Steamship Company the brokers who had possession of the policy undertook to hold it for the benefit of the plaintiffs.

At the time when this policy was effected Brown, Son & Co. had also effected an insurance on disbursements in respect of an intended voyage of the *British Standard* from Cardiff to Rio de Janeiro. The amount of this insurance was in the opinion of the Court excessive. The fact of this over-insurance was not disclosed to the defendants. On May 25, 1910, the *British Standard* while on her voyage from Cardiff to Rio de Janeiro was totally lost by perils of the seas.

The plaintiffs as assignees or as being entitled to an assignment of the above-mentioned policy brought this action against the defendants as upon a total loss thereunder. The defendants among other defences pleaded the non-disclosure of the over-insurance on disbursements.

Bailhache, *K.C.*, and *Leck*, for the plaintiffs. The defence of non-disclosure, however good against a claim by the person originally insured, is not available against a claim by an assignee of the policy who takes the policy bona fide for value and without notice of any infirmity in his assignor's title. This point has been expressly left open for decision by Lord Shaw of Dunfermline in *Thames and Mersey Marine Insurance Co.* v. *Gunford Ship Co.* (1) Non-disclosure derives its effect from the general law and not from any rule of law peculiar to marine insurance. In default of a full disclosure the policy is voidable. If the policy is assigned to a bona fide purchaser for value the equity of the purchaser is equal to if it is not better than that of the underwriter: cf. *Judd* v. *Green*. (2) Why should the latter equity prevail? It is true that generally speaking a chose in action assignable only in equity, and not at law, could only be assigned subject to the equities existing between the original

(1) [1911] A. C. 529, at p. 544. (2) (1875) 45 L. J. (Ch.) 108.

parties to the contract. But there were always exceptions to this rule. First, the person entitled to avoid the contract may estop himself from setting it aside as against an assignee for value, except on the terms of making good to the assignee what he would lose through the avoidance: *Earl of Aldborough* v. *Tiyc*. (1) By accepting notice of assignment of a debt the debtor may preclude himself from setting up as against the assignee equities which would have been available against the assignor: *In re Hercules Insurance Co., Brunton's Claim* (2), where Malins V.-C. declined to follow *Athenæum Life Assurance Society* v. *Pooley*. (3) This doctrine is really based upon an estoppel: *In re Bahia and San Francisco Ry. Co.* (4); *In re Romford Canal Co.* (5) Secondly, the rule "must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities": *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*. (6) A policy of marine insurance is such a contract. It is assignable not only in equity but at law. This was so under the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, which provided that whenever a policy of insurance on any ship had been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy should be entitled to sue thereon in his own name; and the defendant in any action should be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected. A policy of marine insurance differed and still differs from other choses in action in that it may be assigned at law without notice of assignment being given to the underwriter, while in the case of other choses in action such notice to the debtor is necessary by s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66). Again other choses in action can only be

(1) (1840) 7 Cl. & F. 436, at p. 463.
(2) (1874) L. R. 19 Eq. 302.
(3) (1858) 3 De G. & J. 294.
(4) (1868) L. R. 3 Q. B. 584.
(5) (1883) 24 Ch. D. 85.
(6) (1867) L. R. 2 Ch. 391, at p. 397.

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assigned subject to equities between the parties, but even under the Policies of Marine Assurance Act, 1868, the assignee of a marine policy was not affected by all equities between the original parties to the policy: *Pellas* v. *Neptune Marine Insurance Co.* (1) The Act of 1868 has been repealed, and the assignment of policies of marine insurance is now governed by s. 50 of the Marine Insurance Act, 1906. The plaintiffs are entitled to succeed upon the construction of sub-s. 2 of that section, which specifies the conditions and the only conditions on which an insurer can defend himself against a claim by an innocent assignee. The words of the sub-section are "The defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected." The words "any defence arising out of the contract" are the important words. In the Act of 1868 the words "arising out of the contract" did not appear. Sect. 50, sub-s. 2, of the Act of 1906 contains those words and still further limits the lines of defence open to an insurer when sued by an assignee of the policy. Where an assignment takes its force and validity from a statute, the assignment must be unimpeachable except upon the grounds specified by the statute. Therefore the only defence available here is one "arising out of the contract"; the defence in this case, being on the ground of fraud, arises not out of the contract but dehors the contract.

[HAMILTON J. referred to *Blackburn* v. *Vigors*. (2)]

That case merely decided that a contract of marine insurance, although a contract uberrimæ fidei, does not impose on the assured the duty to disclose facts of which he has no notice.

Mackinnon (*Leslie Scott, K.C.*, with him), for the defendants. The fallacy in the argument for the plaintiffs lies in the proposition that the avoidance of policies of marine insurance through non-disclosure of material facts is part of the general law. That is not so. It is part of the law of marine insurance, a branch of the law which has developed from a collection of canons of

(1) (1879) 5 C. P. D. 34.
(2) (1886) 17 Q. B. D. 553; (1887) 12 App. Cas. 531.

construction of various clauses in policies of marine insurance. By the custom of merchants where there has been non-disclosure of material facts the policy is not merely voidable on the ground of fraud, as it would be by the general law: a full disclosure of material facts is a condition precedent to the assured's right to insist on the performance of the contract: *Blackburn* v. *Vigors*, per Lord Esher M.R. in the Court of Appeal (1), per Lord Watson in the House of Lords. (2) The defence of non-disclosure is in effect an allegation that one of the conditions of the contract has not been performed. That is a defence "arising out of the contract" within the meaning of s. 50, sub-s. 2, of the Marine Insurance Act, 1906.

HAMILTON J. The evidence leads me to the conclusion that there was at the time when this policy was effected a concealment from the defendants of material facts, namely, that there was a large insurance upon disbursements, or on a risk ordinarily described as disbursements, over and above the insurance on disbursements intended to be negotiated in London, and that the amount of the extra insurance was excessive. There was no substantial appreciation in the value of the steamer between the date of the builders' contract and the date when the insurances were effected, and no justification on that account of the over-insurance, which I estimate at upwards of 6000*l*. In proportion to the amount that might properly have been insured on disbursements this was an over-insurance so large as to be material to be considered by a prudent underwriter. The principle is that the underwriter must have the opportunity of deciding for himself whether the knowledge of the material fact shall in fact influence him or not, and I am clear that the underwriter in question was entitled to have the fact disclosed to him.

Assuming therefore that the hull policy was effected by a concealment of material facts with regard to the over-insurance on disbursements, the question is whether that is an answer to the present claim which is brought by the builders, who are also mortgagees of the vessel. This is not a case in which the person giving instructions to the insurance broker intended that the

(1) 17 Q. B. D. at p. 562. (2) 12 App. Cas. at p. 539.

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insurance should apply for the benefit of the mortgagors and mortgagees alike. The mortgagees are not therefore persons intended to be covered originally by this insurance. The policy in question, which was put on slip in January but was only signed on April 22, was effected for the purpose of satisfying certain covenants entered into in pursuance of the building contract. It was not formally assigned to the plaintiffs, but the brokers who had possession of the policy undertook by the direction of the British Standard Steamship Company to hold the policy for the benefit of the plaintiffs so as to satisfy their rights as mortgagees.

In these circumstances the plaintiffs contended that, as they are in the position of assignees of the policy, a defence of concealment, which might have been good as against the assignors, the owners of the ship, is not available as against them. They point to the hardship they will suffer if this policy is to be disputed because, through no fault of theirs, proper disclosures were not made, they having trusted the British Standard Steamship Company to make all proper disclosures. Reliance was placed upon the Marine Insurance Act, 1906, s. 50, sub-s. 2. It was pointed out that the words of the Policies of Marine Assurance Act, 1868, s. 1, have not been repeated textually, although that Act is repealed by the Act of 1906. There are other differences between s. 1 of the Act of 1868 and s. 50, sub-s. 2, of the Act of 1906, but in particular the words of the earlier enactment are "The defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected," whereas in the present Act after the words "to make any defence" are inserted the words "arising out of the contract." If by the insertion of the words "arising out of the contract" the Legislature intended to deprive underwriters of the defence of concealment against an assignee and to leave them with that remedy only against the assignor, then under the form of codification the Legislature has in fact made a drastic and far-reaching alteration in the law of marine insurance. Can no explanation of those words be found more

consistent with the declared intention of the Legislature to codify the law? Such an explanation is to be found on reference to the case of *Pellas* v. *Neptune Marine Insurance Co.* (1), which interpreted s. 1 of the Act of 1868 by restricting the defences available against an assignee and excluding those which were unconnected with the policy itself, and thereby gave to that enactment a meaning which is expressed in s. 50 of the Act of 1906. Furthermore the words are "arising out of the contract." I am bound by the authority of the Court of Appeal in *Blackburn* v. *Vigors* (2) and of the House of Lords, more particularly the opinion of Lord Watson (3), to hold, in accordance with what has long been stated by the majority of approved text writers, that the rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition, contained in the contract itself, precedent to the liability of the underwriter to pay. Failure to perform this condition is a defence arising out of the contract—not, it is true, out of any written words in the contract, but still out of the contract itself, because an implied condition precedent to the underwriter's liability has not been performed. If that is so, it is unnecessary to discuss at length the alternative argument that apart from the Act the rule with regard to marine insurance policies ought to be that the defence of concealment is not available to an innocent assignee for value of the policy itself. If s. 50 embodies the law upon this point, upon the clear construction of it the defendant in this case is entitled to this defence because it arises out of the contract sued upon. Mr. Balfhache has, however, contended that there is reason for placing marine insurance policies in the category of instruments which may be transferred free from equities enforceable against the transferor. For the want of authority to support this proposition the explanation is offered that such a case as the present arises but rarely, and therefore the occasion for discussing the matter may never have arisen until now. The principle on which it must rest is to be found in *In re Agra and Masterman's Bank, Ex parte*

(1) 5 C. P. D. 34. (2) 17 Q. B. D. 553.

(3) 12 App. Cas. 531, at p. 539

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WILLIAM PICKERSGILL & SONS, LIMITED v. LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED.

Hamilton J.

Asiatic Banking Corporation (1), namely, that from the nature of the instrument or the terms of the contract or both some instruments may be intended by the parties to be assignable free from equities, at any rate in favour of a transferee taking for value and without notice. The examples suggested of such instruments are so different from the instrument in the present case that further reference to them would be unprofitable. There is nothing in the language of this policy to indicate an intention that it is to be assignable free of any equities which the underwriters may have against the assignors. The terms of the contract are as consistent with its being an assignment subject to all defects in title of the assignor as with its being an assignment free from those defects. Then as to the nature of the transaction, a policy of insurance is only a promise of indemnity giving a right of action for unliquidated damages in case of non-payment: *Pellas* v. *Neptune Marine Insurance Co.* (2) That gives no colour to the suggestion that a policy is a quasi-negotiable instrument. There is no trace of any practice of merchants attaching such a character to these instruments. There is no decision upon the point. The best argument in its favour is an appeal based upon the hardship which the plaintiffs suffer in this individual case. The price of acceding to that appeal is too high; it would involve upsetting the business of insurance and inflicting unwarrantable hardship upon underwriters. In my opinion the argument is unfounded and I am unable to accede to it. There must therefore be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Pritchard & Sons, for Simey & Iliffe, Sunderland.*

Solicitors for defendants: *Waltons & Co.*

(1) L. R. 2 Ch. 391. (2) 5 C. P. D. 34.

W. H. G.

REX *v.* WILTS AND BERKS CANAL COMPANY.

1912
Oct. 23, 24.

Mandamus—Prerogative Writ—Enforcement of Duty to repair Bridge—Vagueness of Duty—Return to Writ.

Upon the argument of a rule nisi for a writ of mandamus to the respondents to repair a bridge it was contended by them (inter alia) that the duty of repairing a bridge was too vague to be enforced by prerogative writ of mandamus:—

Held, that the rule would be made absolute, leaving the respondents to raise the question, if they thought fit, upon the return to the writ.

RULE NISI obtained at the instance of the Berkshire County Council, calling upon the respondents, the Wilts and Berks Canal Company, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to repair and do all things necessary to repair and maintain a certain bridge over the Wilts and Berks Canal, which carried the main road between the town of Abingdon and the village of Drayton, at Caldecott, in the county of Berks, and was known as the Drayton Road Bridge, and the structure wing and parapet walls and side banks of such bridge, and the banks supporting the approaches thereto, so that the bridge might be made suitable and fit for carrying the main road and the persons and traffic using such main road, on the grounds that the respondents were liable to do such repairs and that the bridge was out of repair and unsafe.

The only question material to this report is whether the duty to repair the bridge was of too vague a nature to be enforced by the prerogative writ of mandamus. Other questions which were argued and decided are therefore not referred to.

Graham Moodie (*Lord Russell* with him) shewed cause. The terms of the rule nisi are so vague that the respondents would not know what they were required to do if the Court ordered the writ of mandamus to issue. The Court will not enforce a duty so vague as that of repairing a bridge by a prerogative writ of mandamus.

Disturnal, in support of the rule. It is clear that by the

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prerogative writ of mandamus the Court will compel a system of drainage to be carried out. That is of a much more indefinite nature than the repair of a bridge. The work mentioned in the rule is of a specific kind. If the mandamus issued and the applicants thought the required works had not been carried out they could shew in what respects there had been non-compliance by means of an affidavit.

LORD ALVERSTONE C.J. The only doubt which I have had—but it seems to me not to be sufficient to prevent the rule for the mandamus being made absolute, leaving the respondents the right of raising the question on return if they are so advised to do—is whether the duty of repairing a bridge is of too uncertain a nature to be enforced by the prerogative writ of mandamus. The rule will be made absolute, and if the respondents are so advised they can raise the question upon the return.

CHANNELL and AVORY JJ. agreed.

Rule absolute.

Solicitors for applicants: *Dale & Co.*
Solicitors for respondents: *Boxall & Boxall.*

J. E. A.

POLLARD, Appellant *v.* TURNER, Respondent. 1912 Oct. 31.

Bread—Carrying out Bread for Sale—"Cart or other carriage"—Bicycle with Basket attached—Absence of Scales and Weights—Bread Act, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 7.

By s. 7 of the Bread Act, 1836, every baker or seller of bread "who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights or other sufficient balance."

A boy in the employment of the appellant, a baker, carried out for sale from the appellant's shop several loaves of bread, and for that purpose he rode a bicycle to which was attached in front by means of a strap a wicker basket in which the loaves were carried. The boy was not provided with scales and weights. Upon an information charging the appellant with having by his servant carried out bread for sale in and from a "carriage" without being provided with scales and weights the justices convicted him:—

Held, that, as the bicycle and basket combined constituted a machine adapted for carrying bread and was being used as such, there was evidence upon which the justices were entitled to find that the machine was a "carriage" within the meaning of s. 7 of the Bread Act, 1836.

Case stated by justices for the county of Surrey.

On May 1, 1912, an information was preferred by the respondent against the appellant for that the appellant on April 30, 1912, at Frimley, in the county of Surrey, and beyond ten miles of the Royal Exchange, did unlawfully by his servant carry out bread for sale in and from a carriage without being provided with a correct beam and scales with proper weights or other balance, in order that all bread sold might, in accordance with the Bread Act, 1836 (1), be weighed in the presence of the purchaser thereof.

(1) 6 & 7 Will. 4, c. 37, s. 7: "Every baker or seller of bread beyond the limits aforesaid" (out of the city of London and the liberties thereof, and beyond the weekly bills of mortality and ten miles of the Royal Exchange), "and every journeyman, servant or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights or other sufficient balance in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof . . .

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Upon the hearing of the information the following facts were proved:—

On April 30, 1912, William Vaughan, an assistant inspector for the county of Surrey, saw Wallace Poynter, a lad in the employment of the appellant, in High Street, Frimley. Poynter was in charge of a bicycle to which was attached in front by means of a strap a wicker basket containing eleven loaves and some groceries. In answer to the assistant inspector, Poynter said that he was delivering bread and that he was not provided with scales and weights, stating "I have never carried them." The assistant inspector then asked to be supplied with a loaf, which was done, and for which he paid Poynter threepence. The assistant inspector then made a formal request for the loaf purchased to be weighed, but this Poynter said he was unable to do. Together they then went to the appellant's shop, where the loaf which had been purchased was weighed and found to be deficient by two ounces. The appellant was then present, and the assistant inspector then called his attention to the absence of scales and weights when the loaf was purchased, and in reply the appellant said, "I did not know of the necessity to carry them." When stopped by the assistant inspector, Poynter was in accordance with the appellant's orders delivering the loaves to various customers of the appellant at Frimley Green, and sold one of the loaves to the assistant inspector because he was under the impression that he was bound by law to do so. No evidence was given as to whether the loaves had been previously selected by or sold to the said customers.

It was contended by the respondent that the appellant by his servant had carried out bread for sale in and from a carriage, the bicycle and basket as used being such, without being provided with a correct beam, scales, and weights as required by s. 7 of the Bread Act, 1836.

It was contended on behalf of the appellant that a bicycle was not a cart or carriage within the meaning of the Act, and that in 1836 when the Bread Act was passed, and when bicycles were unknown, it could not have been in the contemplation of the Legislature that a bicycle should be a carriage within the Act; and it was further contended that, although there was a sale by

the appellant's servant to the assistant inspector, the servant was taking particular loaves to particular persons, namely, customers, in compliance with orders previously given, and that the selling of one of such loaves to some one else, namely, the assistant inspector, was not a sale covered by s. 7. (1)

The justices convicted the appellant and fined him 20s., including costs.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

J. F. P. Rawlinson, K.C. (*Storry Deans* with him), for the appellant. The bicycle was not a "cart or other carriage" within the meaning of s. 7 of the Bread Act, 1836. It was an ordinary bicycle to which was strapped in front, probably to the handle bar, a basket containing loaves for delivery to customers. The basket was not a fixture on the bicycle; it was merely strapped on to the bicycle, and that fact did not make the basket part of the bicycle any more than the strapping of a bag of golf clubs on to a bicycle would make the bag of golf clubs part of the bicycle. It is clear that, if the boy had walked with a basket of loaves on his arm, he need not have carried scales and weights: nor need he have carried scales and weights if he had ridden a horse and carried a basket of loaves on his arm. So too if the boy had ridden a bicycle and carried a basket of loaves on his arm or over his back he need not have carried scales and weights. A bicycle itself is not a "carriage" within the meaning of the section. Can it make any difference if he strapped the basket on to the bicycle? It is not conveying or carrying out bread for sale "in and from a cart or other carriage." The basket was no part of the bicycle. Nor would a tricycle with a basket similarly strapped on to it be a "carriage." No doubt in certain cases, such as the liability to pay tolls when crossing a bridge, a bicycle may be a "carriage": *Cannan* v. *Earl of Abingdon* (2); see also *Simpson* v. *Teignmouth and Shaldon Ferries*

(1) This second point taken by the appellant before the justices was not relied upon by him on the appeal.

(2) [1900] 2 Q. B. 66.

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Co. (1): and by s. 85 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), bicycles are declared to be carriages within the meaning of the Highway Acts. But to see whether a bicycle is a "carriage" within the meaning of any particular Act the object of the enactment must be looked at. The object of s. 7 of the Bread Act, 1836, is to enable customers to have bread weighed when it is being carried out for sale in a cart or carriage, that is to say, in a vehicle constructed for the carriage of bread together with proper scales and weights. A bicycle is not within that description, and it would be oppressive to trade to compel a boy on a bicycle to carry scales and weights. Bicycles were not in existence when the Act was passed, and could not have been in the contemplation of the Legislature then, and it would interfere oppressively with trade to bring them within the Act. Under the similar section, s. 9, of the Bread Act, 1822 (3 Geo. 4, c. cvi.), applicable to London and to the district within ten miles of the Royal Exchange, the words "cart or other carriage" are immediately followed by "drawn by a horse, mule, or ass," and therefore this bicycle could not be deemed to be a "cart or other carriage" within the meaning of that Act. The Legislature, having in 1822 attached that meaning to the words "cart or other carriage," had that meaning in mind when the later Act of 1836 was passed, and thought that it was unnecessary to repeat the qualifying words. The object of the two Acts being the same, the Court ought to give the same meaning to the words "cart or other carriage" in each case and to bring the two enactments into harmony. The conviction was therefore wrong. [*Robinson* v. *Cliff* (2) and *Daniel* v. *Whitfield* (3) were also referred to.]

Cecil Whiteley, for the respondent. It is not necessary to consider whether a bicycle is of itself a "cart or other carriage" within the meaning of s. 7 of the Bread Act, 1836. The question is whether the justices were entitled to come to the conclusion that this bicycle with the basket attached to it by means of a strap was a "carriage" within the meaning of the section. The basket was a large basket because it was carrying eleven loaves

(1) [1903] 1 K. B. 405. (2) (1876) 1 Ex. D. 294.
(3) (1885) 15 Q. B. D. 408.

and some groceries, and it was quite capable of carrying scales and weights. Any machine which is capable of and which is used for the purpose of carrying bread for sale is a "carriage" within the Act. A hand cart or a perambulator, if used for carrying loaves for sale, would be a "carriage" within the Act. The Bread Act, 1836, recites the Act of 1822, and in s. 7 adopts the wording of s. 9 of the earlier Act, but deliberately omits after "cart or other carriage" the words "drawn by a horse, mule, or ass." The Legislature therefore intended to use the words "cart or other carriage" in their widest sense. To see whether a bicycle comes within the word "carriage" in any particular Act the object of the Act must be looked at. The object of the Bread Act, 1836, is to enable the purchaser of bread to have it weighed when he purchases it, either at the shop or on delivery at his house: *Robinson* v. *Cliff* (1); *Ridgway* v. *Ward* (2); though the bread has been sold in the shop, appropriated there, and weighed there in the presence of the purchaser, the fact that it is subsequently sent to the purchaser's house as a matter of favour to him does not bring the case within the Act: *Daniel* v. *Whitehead* (3). In *Taylor* v. *Goodwin* (4) the argument that because bicycles were unknown at the time of the passing of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), they were not included in the word "carriage" in the Act was not adopted. As Bigham J. said in *Cannan* v. *Earl of Dundee* (5), "The bicycle or tricycle is a thing which carries. It may carry a man, as a horse does, or a carriage does; it may carry luggage or goods as we know that tradesmen's tricycles do." The words "cart or other carriage" in s. 7 mean any machine which carries. Upon the findings in this case the bicycle with the basket attached was a "carriage" within that section.

Rawlinson, K.C., in reply.

LORD ALVERSTONE C.J. In my opinion this appeal should be dismissed. I do not propose to attempt to lay down any exhaustive definition of the vehicle which is a "cart or other carriage" within

(1) 1 Ex. D. 294.
(2) (1884) 14 Q. B. D. 110.
(3) 15 Q. B. D. 408.
(4) (1879) 4 Q. B. D. 228.
(5) [1900] 2 Q. B. 66, at p. 71.

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the meaning of s. 7 of the Bread Act, 1836. It seems to me that if the vehicle in question is adapted for the carriage of goods, and at the time it is being used it is carrying bread, it may come within the section. The point raised before the justices did not turn upon the mode in which the basket was attached to the bicycle. It is quite consistent with the findings in the case that this basket was a flat basket which was fastened on the front of the bicycle by means of a strap, and which would remain on the bicycle when it was not being used. The basket was capable of carrying eleven loaves and some groceries. The justices, as I understand, came to the conclusion that the bicycle and basket combined constituted a machine adapted for and capable of carrying goods, and at the time it was being used for carrying bread for sale. In those circumstances it is not ad rem to say that a bicycle is not a "carriage" within the meaning of the section, because to deal with this machine as a bicycle simply is to ignore its actual condition and structure. One has only to consider the case of a tricycle, which counsel for the appellant had to contend would not come within the words "cart or other carriage" in the section. It is common knowledge that tradesmen's tricycles have large wooden boxes, which are part of their structure, for the purpose of carrying goods. I do not say that, if this were the case of a boy riding a bicycle and carrying a basket on his arm, the bicycle would come within the words "cart or other carriage" in s. 7 of the Act. That is not the present case. As appears from the contentions in the case the justices had to say whether the bicycle with the basket was a "cart or other carriage" within the meaning of s. 7, and they have come to the conclusion that it was. If a bicycle by reason of its structure is capable of carrying goods and is being used as a machine for carrying goods as well as the rider, and not merely for the purpose of carrying the rider, it may well come within the words "cart or other carriage" in s. 7 of the Act. The justices by convicting the appellant must have found that the bicycle and basket combined were a "carriage" for carrying goods and not merely the boy, and it is not suggested that the machine was not capable of carrying the requisite scales and weights for weighing the bread. The justices were entitled so to find. The appeal must be dismissed and the conviction affirmed.

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CHANNELL J. I am of the same opinion. The appellant was carrying out bread for sale in and from a machine which had been adapted for the carriage of goods, and which therefore was a "cart or other carriage" within the meaning of s. 7 of the Bread Act, 1836.

AVORY J. I am of the same opinion. The real point before the minds of the justices was that stated in the respondent's contention, namely, that the appellant, by his servant, had carried out bread for sale in and from a carriage, the bicycle and basket as used being such, without being provided with a correct beam and scales and weights as required by s. 7 of the Bread Act, 1836. Therefore the point before the justices was that the bicycle and basket as used constituted a "carriage" within the meaning of the Act. The justices must have found that as a fact, because they convicted the appellant, and in my opinion there was evidence upon which they were entitled to find that the bicycle and basket as used constituted a "carriage" within the meaning of the Act.

Appeal dismissed.

Solicitors for appellant: *Richardson, Sadlers & Callard.*

Solicitors for respondent: *Wyatt & Co., for T. W. Weeding, Kingston-upon-Thames.*

W. F. B.

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Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, and is pending, no application to stay the action having been made under s. 4 of the Arbitration Act, 1889, or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid, and will not afford a defence to the action.

By a clause in a contract between the plaintiffs and the defendants, a municipal corporation, for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt or difference arising or happening, touching, or concerning the works, or relating to quantities, qualities, description, or manner of work done, executed, or to be done and executed by the contractors or in any wise whatever relating to the interests of the said corporation or of the contractors, such doubts, disputes, or differences should from time to time be referred to and settled and decided by the defendants' engineer, who should be competent to enter upon the subject-matter of such doubts, disputes or differences with or without formal reference or notice to the parties to the said contract or either of them, and who should judge, decide, order and determine thereon.

The plaintiffs brought an action against the defendants for sums which they alleged to have become due to them from the defendants under the contract, and for damages for wrongful termination of the contract by the defendants. The defendants did not apply for a stay of proceedings in the action under s. 4 of the Arbitration Act, 1889. Subsequently to the commencement of the action, the defendants' engineer under the before-mentioned clause, without giving notice to the parties, and without the knowledge or consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action, and the defendants pleaded his award in bar to the plaintiffs' claim in the action—

Held (reversing the decision of Scrutton J.) by Fletcher Moulton L.J. and Farwell L.J., Vaughan Williams L.J. dissenting, that it was not

ARBITRATION—*continued.*
competent for the engineer to determine the matters in question, pending the action, and that therefore his award was no bar to the plaintiffs' claim in the action. DOLEMAN & SONS *v.* OSSETT CORPORATION - - - - - C. A. 257

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In an action against the debtor for specific performance of a contract to purchase real estate an order was made on February 17, 1911, that upon the plaintiffs executing a conveyance, to be settled by the judge in case the parties differed, the defendant should pay to the plaintiffs at such time and place to be agreed upon or fixed by the judge, but not before July 6, 1911, the sum of 2400*l.*, representing the agreed amount of principal and interest payable under the contract on March 1, 1911, and it was ordered that the plaintiffs' costs should be taxed and paid by the defendant, and that all further proceedings in the action be stayed except for the purpose of carrying the order into effect.

On January 12, 1912, the Master certified that the conveyance had been settled and executed, and fixed February 12, 1912, as the date for the payment of the 2400*l.*

On March 23, 1912, the plaintiffs issued and served upon the debtor a bankruptcy notice to pay the sum of 2400*l.* "due on a final judgment or order" dated February 17, 1911, "whereon execution has not been stayed":—

Held, (1.) that the judgment was a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, upon which the bankruptcy notice could be founded; (2.) that the notice was accurate in stating that execution upon the judgment had not been stayed; (3.) that the judgment was not incorrectly described in the notice as a "judgment or order"; and that consequently the notice was valid.

Ex parte Moore (1885) 14 Q. B. D. 627, and *In re Poole* (1890) 7 Morrell, 222, followed. *In re* A DEBTOR (No. 837 OF 1912) - C. A. 242

2. —— *Bankruptcy Notice—Judgment in County Court—No Order for Payment by Instalments—Payment into Court of Part of Debt—Bankruptcy Notice for full Amount—Execution—Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*County Court Rules*, 1903 *and* 1904, *Order* XXIII., *r.* 13; *Order* XXV., *rr.* 8, 23A, 23B; *Appendix H Form* 163.

Certain creditors recovered a judgment against a debtor in the county court and it was ordered that the full amount of the judgment debt should be paid on a day specified. Before the day named in the judgment for payment of the debt the debtor paid into Court a sum in part satisfaction thereof. The judgment creditors repudiated this payment and issued a bankruptcy notice requiring the debtor to pay the judgment debt in full without making any allowance for the payment into Court:—

Held, that after the payment into Court execution could not issue for the full amount of the judgment, but only for the balance after giving credit for the amount paid into Court, and consequently that the bankruptcy notice was invalid.

In re Child [1892] 2 Q. B. 77, followed.

Decision of a Divisional Court [1912] 2 K. B. 451, affirmed.

Whether, where a creditor has recovered judgment against a debtor in the county court, it is competent, in the absence of consent to payment by instalments, for the debtor to pay

BANKRUPTCY—*continued.*

into Court and for the registrar to receive a sum less than the full amount of the judgment debt, quære. *In re* MILLER. *Ex parte* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED C. A. 1

3. —— *Petition—Suspension of Payment—Proposed Deed of Assignment—Assent of Creditor—Revocation of Assent before Execution of Deed—Estoppel—Joint Petition.*

A creditor, who has assented to a proposed deed of assignment by a debtor for the benefit of his creditors, may revoke his assent before the deed is executed. A creditor so revoking his assent is not precluded from relying on any act or acts leading to or connected with the proposed assignment as an act or acts of bankruptcy on which to found a petition.

In re Hawley, Ex parte Ridgway (1897) 4 Mans. 41, and *In re Woodroffe, Ex parte Woodroffe* (1897) 4 Mans. 46, distinguished.

Where a joint petition in respect of several debts is presented by two creditors of whom one is and the other is not estopped from relying on the act of bankruptcy on which the petition is founded, a receiving order may be made if the debt due to the creditor who is not estopped is sufficient. *In re* JONES BROTHERS. *Ex parte* ASSOCIATED NEWSPAPERS, LIMITED Div. Ct. 234

4. —— *Voluntary Settlement—Bankruptcy of Settlor—Sale by Voluntary Donee after Act of Bankruptcy—Provision for Valuable Consideration—Title of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property as against the trustee in bankruptcy of the settlor even though the purchase is subsequent to the act of bankruptcy, to which the title of the trustee relates back.

The equitable principle acted on in *In re Carter and Kenderdine's Contract* [1897] 1 Ch. 776, extended.

Decision of Phillimore J., reported [1912] 2 K. B. 257, reversed. *In re* HART. *Ex parte* GREEN - - - - - - - C. A. 6

—— Costs, Security for — Nominal plaintiff—Action by bankrupt—"Personal earnings"—Intervention of trustee - 162
See PRACTICE, 1.

BASTARDY — *Variation of Summons—Order made Nunc pro tunc—Marriage of Mother—Application by Mother for Amendment of Date of Hearing in Summons—Power of Justices to make Order—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3, 4.

In April, 1911, a summons under the Bastardy Laws Amendment Act, 1872, against the putative father of an illegitimate child was issued upon an application made by the mother of the child, she being then a single woman. The summons could not be served owing to the absence of the putative father. In September, 1911, the mother married and in January, 1912,

BASTARDY—*continued.*

the putative father of the child having returned, the mother applied to the clerk to the justices to amend the date of hearing in the summons. The summons was accordingly altered and served upon the putative father, and at the hearing, which took place in February, 1912, the justices adjudged him to be the father of the child and ordered him to contribute to its maintenance:—

Held, that the summons so altered by the clerk to the justices was equivalent to a second summons, and as the mother was a married woman at the date she applied for the alteration to be made, the case fell within the decision in *Tozer* v. *Lake* (1879) 4 C. P. D. 322, and the justices had no power to make the order.

Per Avory J. (following the decision in *Ex parte Fielding* (1861) 25 J. P. 759): The application by the mother must be deemed to have been made in January, 1912, when the altered summons was issued, and as she was not then a single woman, no order could be made upon the application. HEALEY *v.* WRIGHT Div. Ct. 249

—— Desertion—Order for weekly payments—Return to cohabitation—Arrears recoverable - - - - - 91
See HUSBAND AND WIFE.

BICYCLE—Carrying out bread for sale—"Cart or other carriage"—Bicycle with basket attached—Absence of scales and weights
See BREAD. - - - - - - 625

BOOK DEBTS — Company — Sale of goods — Hypothecation of proceeds—Charge on book debts - - - - - - 275
See COMPANY. 2.

BREAD — *Carrying out Bread for Sale—"Cart or other carriage"—Bicycle with Basket attached—Absence of Scales and Weights—Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 7.

By s. 7 of the Bread Act, 1836, every baker or seller of bread "who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights or other sufficient balance."

A boy in the employment of the appellant, a baker, carried out for sale from the appellant's shop several loaves of bread, and for that purpose he rode a bicycle to which was attached in front of the handle-bars a basket [illegible] information charging the appellant with having [illegible] from a "carriage" without being provided with scales and weights the justices convicted him:—

Held, that, as the [illegible] basket [illegible] a machine adapted for carrying bread and was being used as such, there was [illegible] within the justices were not bound to find that the machine was a "carriage" within the meaning of s. 7 of the Bread Act, 1836 [illegible] Div. Ct. 625

BREWER—Duty—Brewers' profits—Deduction—"Increased value" from sale of non-intoxicants - - - - - **377**
See REVENUE. 2.

BRIDGE—Prerogative writ—Enforcement of duty to repair bridge—Vagueness of duty—Return to writ - - - **623**
See MANDAMUS.

BUILDING—Party wall—Dispute as to method of repairing defective party wall—Previous history of wall - - **510**
See LONDON. 1.

CARDS—Money won by cheating at cards—Obtaining money by false pretences—Extradition Treaty with Germany, 1872—Habeas corpus—Second writ - **424**
See CRIMINAL LAW. 2.

—— "Three card trick"—Obtaining money by false pretences - - - - **568**
See CRIMINAL LAW. 5.

CARPET BEATING—Factory and Workshop Acts—"Manufacturing process" carried on in premises - - - - **218**
See FACTORY. 2.

"**CARRIAGE**"—Bread—Carrying out bread for sale—"Cart or other carriage"—Bicycle with basket attached—Absence of scales and weights - - - - **625**
See BREAD.

CASES:—

—— *Ashby's Cobham Brewery Co.'s Case* [1906] 2 K. B. 754.
Principles laid down in, applied. TRUMAN, HANBURY, BUXTON & Co. *v.* INLAND REVENUE COMMISSIONERS [1912] 3 K. B. 377

—— *Baker* v. *Ingall* - [1911] 2 K. B. 132
Reversed - [1912] 3 K. B. 106

—— *Brocklesby* v. *Temperance Permanent Building Society* [1895] A. C. 173.
Applied. FRY *v.* SMELLIE [1912] 3 K. B. 282

—— *Cantiere Meccanico Brindisino* v. *Janson* [1912] 2 K. B. 112.
Affirmed - - [1912] 3 K. B. 452

—— *Carter and Kenderdine's Contract, In re* [1897] 1 Ch. 776.
The equitable principle acted on in, extended. *In re* HART. *Ex parte* GREEN - - [1912] 3 K. B. 6

—— *Care* v. *Horsell* - - [1912] W. N. 19
Affirmed - - [1912] 3 K. B. 533

—— *Child, In re* - - [1892] 2 Q. B. 77
Followed. *In re* MILLER. *Ex parte* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED [1912] 3 K. B. 1

—— *Cox* v. *Midland Counties Ry. Co.* (1849) 3 Ex. 268.
Followed. HOUGHTON *v.* PILKINGTON [1912] 3 K. B. 308

CASES—*continued.*

—— *Dobson* v. *British Oil and Cake Mills* (1912) 5 Butt. W. C. C. 405.
Followed. EDGE *v.* J. GORTON, LIMITED [1912] 3 K. B. 360

—— *Edwards* v. *Wickwar* (1866) L. R. 1 Eq. 403
Not followed. HORN *v.* BEARD [1912] 3 K. B. 181

—— *Everth* v. *Smith* - (1814) 2 M. & S. 278
Followed. SCOTTISH SHIRE LINE, LIMITED *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED [1912] 3 K. B. 51

—— *Fielding, Ex parte* - (1861) 25 J. P. 759
Followed. HEALEY *v.* WRIGHT [1912] 3 K. B. 249

—— *France* v. *Clark* - (1884) 26 Ch. D. 257
Distinguished. FRY *v.* SMELLIE [1912] 3 K. B. 282

—— *Hart, In re; Ex parte Green* [1912] 2 K. B. 257.
Reversed - - [1912] 3 K. B. 6

—— *Hawley, In re; Ex parte Ridgway* (1897) 4 Mans. 41.
Distinguished. *In re* JONES BROTHERS. *Ex parte* ASSOCIATED NEWSPAPERS, LIMITED - - [1912] 3 K. B. 234

—— *Herring* v. *Metropolitan Board of Works* (1865) 19 C. B. (N.S.) 510.
Distinguished.
[*Per* Fletcher Moulton L.J.: *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 510, should be treated as overruled.]
LINGKE *v.* CHRISTCHURCH CORPORATION - - [1912] 3 K. B. 595

—— *London Furnishing Co.* v. *Solomon* (1912) 28 Times L. R. 265.
Overruled. HACKNEY FURNISHING COMPANY *v.* WATTS [1912] 3 K. B. 225

—— *Mentors, Limited* v. *Evans* [1912] 1 K. B. 254.
Affirmed - - [1912] 3 K. B. 174

—— *Miller, In re; Ex parte Furniture and Fine Arts Depositories, Limited* [1912] 2 K. 451.
Affirmed - - [1912] 3 K. B. 1

—— *Moore, Ex parte* (1885) - 14 Q. B. D. 627
Followed. *In re* A DEBTOR (No. 837 OF 1912) - - [1912] 3 K. B. 242

—— *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (1910) 102 L. T. 571.
Followed. JOHNSTON *v.* LALONDE BROTHERS & PARHAM [1912] 3 K. B. 218

—— *Poole, In re* - (1890) 7 Morrell, 222
Followed. *In re* A DEBTOR (No. 837 OF 1912) - - [1912] 3 K. B. 242

—— *Reg.* v. *Bailey and Others* (1850) 4 Cox, C. C. 390.
Followed. REX *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SJOLAND AND METZLER - [1912] 3 K. B. 568

CASES—*continued.*

—— *Reg.* v. *Danger* (1857) 1 Dears. & B. C. C. 307.
Considered and distinguished. REX. *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* STALLMANN - [1912] 3 K. B. 424

—— *Richards* v. *Butcher* (1890) 7 Rep. Pat. Cas. 288.
Followed. DENTAL MANUFACTURING COMPANY, LIMITED *v.* C. DE TREY & CO. - - - - [1912] 3 K. B. 76

—— *Royal Masonic Institution for Boys (Trustees of)* v. *Parkes* [1912] 3 K. B. 212.
Followed. JOHNSTON *v.* LALONDE BROTHERS & PARHAM [1912] 3 K. B. 218

—— *Swansea Corporation* v. *Harpur* [1912] 2 K. B. 16.
Reversed - - [1912] 3 K. B. 493

—— *Tozer* v. *Lake* - (1879) 4 C. P. D. 322
Applicable. HEALEY *v.* WRIGHT [1912] 3 K. B. 249

—— *Wakefield Rural District Council* v. *Hall* [1912] 2 K. B. 265
Reversed - - [1912] 3 K. B. 328

—— *Woodroff, In re; Ex parte Woodroff* (1897) 4 Mans. 46.
Distinguished. *In re* JONES BROTHERS. *Ex parte* ASSOCIATED NEWSPAPERS, LIMITED - - [1912] 3 K. B. 234

CHARGE—Company—Sale of goods—Hypothecation of proceeds—Charge on book debts - - - - - - 275
See COMPANY. 2.

CHARTERPARTY—Shipping.
See SHIPPING.

CHILDREN.
See INFANT.

CHILDREN ACT, 1908 - - - - 341
See CRIMINAL LAW. 4.

COMPANY.—*Registration—Name of proposed Company—Similarity to Name of Company already registered—Calculated to deceive—Refusal of Registrar to register—Mandamus—Discretion of Registrar—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 8, *sub-s.* 1; *s.* 15.

Upon an application under s. 15 of the Companies (Consolidation) Act, 1908, to the Registrar of Companies to register a company with the name "The Water Softening Materials Company (Limited)," the registrar refused to register it upon the ground that the name so nearly resembled that of "Water Softeners, Limited," an existing company already registered, as to be calculated to deceive within the meaning of s. 8, sub-s. 1, of the Act. The applicants applied for a writ of mandamus to the registrar to register the company with that name upon the grounds that he was required to do so under s. 15 and that the name did not so nearly resemble that of any company already registered as to be calculated to deceive:—

Held, that the mandamus must be refused as there was no ground for saying that the registrar, in exercising his discretion, had come to a wrong decision.

Per Avory J.: The registrar having to exercise a discretion in the matter, the Court would not be justified in interfering by mandamus unless either the registrar had not in fact exercised any discretion in the particular case, or had exercised it upon some wrong principle of law, or had been influenced by extraneous considerations which he ought not to have taken into account. THE KING *v.* REGISTRAR OF COMPANIES - - - - - Div. Ct. 23

2. —— *Sale of Goods—Hypothecation of Proceeds—Charge on Book Debts—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7 *c.* 69), *s.* 93, *sub-s.* 1 (*e*).

The defendant company, carrying on business as merchants in Manchester, consigned goods to their customers in South America, and, in order to obtain advances from the plaintiffs, who were bankers, wrote to the plaintiffs enclosing for their acceptance the company's drafts drawn in respect of specified shipments then being made and copies of the bills of lading and of the invoices relating thereto, and stating that the defendant company hypothecated the goods or the proceeds thereof to the plaintiffs. As between the defendant company and their customers the terms of sale were such that the property in the goods passed on shipment to the customers to whose orders the bills of lading were drawn. The plaintiffs having accepted drafts in the above circumstances, and the defendant company having gone into liquidation, the plaintiffs claimed to be entitled to the proceeds of the goods as against the liquidator:

Held, that the effect of the transaction was that the defendant company had created a charge on the company's book debts within s. 93, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908, which charge, not having been registered as required by the section, was void as against the liquidator, and that the plaintiffs' claim, therefore, failed. LADENBURG & CO. *v.* GOODWIN, FERREIRA & CO., LIMITED AND GARNETT - - - - Pickford J. 275

Principal and agent—Authority of agent to pledge shares for particular sum—Pledge of shares for lesser sum—Liability of principal - - - - - 282
See PRINCIPAL AND AGENT.

COMPENSATION—Obstruction of access to house and shop—Work executed under statutory authority—Right of occupier to compensation - - - - 595
See LOCAL AUTHORITY.

—— Railway (Light)—Compulsory purchase—Assessment of compensation—Award—Mandamus to take up award - - 72
See RAILWAY.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONCEALMENT — Assignment — Assignee for value without notice—Defence arising out of the contract - - - 614
See INSURANCE (MARINE). 1.

CONDITION—Licensing Acts—Conditional grant—Retrictions on user - - 583
See LICENSING ACTS.

—— Precedent (Condition) — Prosecution — Offences—Condemnation by justice of the peace - - - - - - 35
See LONDON. 2.

—— Workmen's compensation — Arbitration—Condition precedent - - 346
See EMPLOYER AND WORKMAN. 1.

CONSENT — Indecent assault — Direction to jury - - - - - - - 572
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CONSIDERATION — Fraudulent conveyance — Valuable consideration — Antecedent debt—Garnishee proceedings - 474
See FRAUDULENT CONVEYANCE.

CONTRACT—Arbitration—Contract for execution of works—Provision for reference of disputes under contract—Award subsequent to action brought on contract—Invalidity of award - - - 257
See ARBITRATION.

—— Sale of goods—Act done by plaintiff in mitigation of damages—Appeal—Award incorporating opinion of High Court—Error on face of award - - 128
See DAMAGES.

CONVEYANCE — Fraudulent — Valuable consideration — Antecedent debt — Garnishee proceedings - - - 474
See FRAUDULENT CONVEYANCE.

COSTS—County court—Remitted action—Costs of proceedings under Order XIV.—Discretion of judge - - - 174
See COUNTY COURT.

—— Security for costs—Nominal plaintiff—Action by bankrupt—"Personal earnings" - - - - - - 162
See PRACTICE. 1.

—— Trial before official referee—Separate issues
See PRACTICE. 2. 155

—— Waterworks—Breaking up streets—Laying water pipe therein—Subsequent subsidence of street—Cost of repair - 493
See WATER. 2.

COUNTY COURT—*Practice — Remitted Action —Costs of Proceedings under Order XIV.—Discretion of Judge—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113, 116.

In an action brought in the High Court the plaintiffs applied for summary judgment under Order XIV. The defendant obtained leave to defend as to part of the claim on the terms of his paying the balance of 3*l.* to the plaintiffs, and the action was remitted to the county court. The defendant paid the 3*l.* to the plaintiffs, and the action proceeded. At the trial judgment was entered for the defendant with costs on the higher scale:—

Held, that the Court had a discretion under s. 113 of the County Courts Act, 1888, to order the plaintiffs to pay to the defendant the costs of the proceedings under Order XIV., notwithstanding that the plaintiffs had by those proceedings succeeded in obtaining satisfaction of a portion of their claim.

Decision of Divisional Court [1912] 1 K. B. 254, affirmed. MENTORS, LIMITED *v.* EVANS C. A. 174

—— Bankruptcy notice—Judgment in county court—No order for payment by instalments—Payment into Court of part of debt — Bankruptcy notice for full amount—Execution - - - 1
See BANKRUPTCY. 2.

COUNTY COURT RULES, 1903 and 1904, Order XXIII., r. 13 - - - - - 1
See BANKRUPTCY. 2.

—— —— **Order XXV., rr. 8, 23A, 23B; Appendix H. Form 163** - - - - - 1
See BANKRUPTCY. 2.

COVENANT—Lease—Lessor's covenant—Covenant not to let "any of the adjoining shops" for certain specified purpose—Meaning of "adjoining" - - 533
See LANDLORD AND TENANT. 2.

CREDITORS—Bankruptcy.
See under BANKRUPTCY.

CRIMINAL LAW—*Evidence—Charge of Illegal Operation upon a Woman—Statements made by Deceased Woman before and after Miscarriage—Admissibility as Evidence for Defence.*

At the trial of the appellant upon a charge of having used an instrument upon a woman in order to procure miscarriage, his defence was that he had done nothing to her, but that she had performed such an operation upon herself. His counsel, in cross-examination, sought to ask questions of a witness for the prosecution as to statements made by the woman (who was dead) some time before her miscarriage that she intended to operate upon herself, and shortly after her miscarriage that she had operated upon herself; but the learned judge refused to permit these questions.

Held, that these statements, being mere hearsay, were not admissible in evidence for the defence. THE KING *v.* THOMSON - C. C. A. 19

2. —— *Habeas Corpus — Second Writ — Grounds of Detention of Prisoner—Extradition —"Trial and Discharge" of Prisoner—Subsequent Proceedings for Extradition—Obtaining Money by False Pretences—Money won by Cheating at Cards—Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2), *s.* 5—*Extradition Treaty with Germany*, 1872, *Articles II., IV., and XV.—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

Sect. 6 of the Habeas Corpus Act, 1679, only applies where the return to the second writ of

CRIMINAL LAW—*continued.*

habeas corpus raises for the opinion of the Court the same question with regard to the validity of the grounds of detention as the first.

Therefore, where a prisoner, a German subject, was discharged from custody upon directions given by a High Court of Judicature in India in the nature of habeas corpus on the ground that his detention was illegal in consequence of an informality in the course of proceedings before a magistrate for the extradition of the prisoner from India to Germany :—

Held, that he could be re-arrested in England and committed by a magistrate for extradition to Germany in proceedings validly conducted before him upon the same charge as that which formed the subject of the invalid extradition proceedings in India.

By article IV. of the Extradition Treaty with Germany, 1872, extradition is not to take place if the person claimed has already been "tried and discharged" :—

Held, that the prisoner had not been "tried and discharged" in India, inasmuch as the word "tried" in the treaty is used in the strict sense of the term, and does not include a preliminary investigation as to whether there is sufficient evidence for extradition.

By article II. of the Treaty of 1872 the crimes for which extradition is to be granted are (inter alia) obtaining money or goods by false pretences.

By the Gaming Act, 1845, s. 17, a person who by any fraud in playing at cards wins from any other person any sum of money or valuable thing is to be deemed guilty of obtaining the money or valuable thing by a false pretence with intent to cheat or defraud the other person.

The prisoner was charged with obtaining money and goods by false pretences from D. There was evidence that the prisoner, D. and a third person played a game of cards at which the prisoner and the third person [illegible] cheated D. As the result of the play a sum of 80,000 marks (about 4000*l.*) was won from D. by the third person. The third person drew some blank bill forms out of his pocket, and the prisoner requested D. to accept one. D. accordingly wrote his acceptance upon it, and it was subsequently signed by the third party as drawer and indorsed by him and the prisoner :—

Held, that there was evidence upon which the prisoner could properly be charged with obtaining money and goods by false pretences, and that as that crime is included in the Extradition Treaty with Germany, 1872, an order could be made for the extradition of the prisoner from England to Germany.

Reg. v. Dungey (1857) 1 Dears. & B. C. C. 307, considered and distinguished. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SALLMANN - - - - - Div. Ct. 424

3. —— *Indecent Assault—Consent—Direction to Jury.*

If on a prosecution for indecent assault there is no evidence from which the jury can reasonably infer that the prosecutrix consented to the acts alleged to have been committed by the accused, it is not necessary that the jury should receive any direction on the question of consent. THE KING *v.* MAY - - - - C. C. A. 572

4. —— *Indecent Assault on Girl under Thirteen—Sufficiency of Indictment—Absence of Averment of Age of Girl—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 52—*Criminal Law Amendment Act*, 1880 (43 & 44 *Vict. c.* 45), *s.* 2—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 123, *sub-s.* 2.

By s. 52 of the Offences against the Person Act, 1861, "Whosoever shall be convicted of any indecent assault upon any female . . . . shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

By s. 2 of the Criminal Law Amendment Act, 1880, "it shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency."

By s. 123, sub-s. 2, of the Children Act, 1908, "where in a charge or indictment for . . . . any of the offences mentioned in the First Schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person . . . . in respect of whom the offence was committed was . . . . under . . . . any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence . . . . under . . . . the specified age . . . . he shall for the purposes of this Act be presumed at that date to have been . . . . under . . . . that age . . . ."

Among the offences mentioned in the First Schedule to the Act of 1908 is any offence under s. 52 of the Offences against the Person Act, 1861, against a child (defined by s. 131 of the Act of 1908 as a person under the age of fourteen years).

An indictment for an indecent assault upon a girl under thirteen years of age contained no averment as to her age :—

Held, that although in the absence of an averment that the girl was under thirteen years of age the prosecution was deprived of the benefit of the presumption which would have arisen under s. 123, sub-s. 2, of the Children Act, 1908, if the indictment had contained the averment and she had appeared to the Court to have been at the date of the commission of the offence under the age of thirteen, the indictment was good, inasmuch as s. 2 of the Criminal Law Amendment Act, 1880, only deprives the prisoner of the defence of consent of the young person under the age of thirteen, but does not create a new offence, and there was no omission of any matter necessary to be proved in order to convict the prisoner upon the indictment. THE KING *v.* STEPHENSON - - - - C. C. A. 341

5. —— *Obtaining Money by False Pretences—"Three Card Trick"—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

[illegible] in which one player, having shown three [illegible] placed them face downwards and [illegible]

CRIMINAL LAW—*continued.*
their relative positions, and then the other player has to indicate the position of a particular card—the fact that they fraudulently pretend to be strangers and when playing together arrange that the one who has to point out the particular card shall win, with the view of inducing the prosecutor to play, is not a "fraud or unlawful device or ill practice in playing at or with cards" within the meaning of s. 17 of the Gaming Act, 1845, so as to support a charge of obtaining from the prosecutor by false pretences money won from him at the game.

Reg. v. *Bailey and Others* (1850) 4 Cox, C. C. 390, followed. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SJOLAND AND METZLER - - - - - - **Div. Ct. 568**

DAIRIES, COWSHEDS, AND MILKSHOPS ORDER, 1885, art. 6 (1.) - **576**
See MILK.

DAMAGE—Savage animal—Liability of owner—Remoteness of damage - - **198**
See NEGLIGENCE.

—— Work executed under statutory authority—"Damage"—Obstruction of access to house and shop—Right of occupier to compensation - - - - - **595**
See LOCAL AUTHORITY.

DAMAGES—*Contract—Sale of Goods—Act done by Plaintiff in Mitigation of Damages—Profit accruing therefrom to the Plaintiff—Relevancy—Practice—Appeal—Arbitration—Special Case stated for Consultative Opinion of High Court—Award incorporating Opinion of High Court—Error on Face of Award.*

The W. Company, having contracted to supply certain electric machines to a railway company, delivered machines which failed to satisfy the conditions of the contract as to economy of working. The railway company accepted the machines, reserving their right to damages for the breach of contract, and subsequently, in order to avoid the expense of the continued use of the machines, bought machines of another manufacturer, P., with which they replaced those of the W. Company. If the railway company had continued to use the W. machines, the loss which they would have suffered in consequence of the breach of contract—namely, the amount by which the cost of working the machines supplied during a period of years representing the normal life of a W machine would have exceeded the cost of working W. machines constructed in accordance with the contract for the same period—would have represented a larger sum than the price paid for the substituted P. machines:—

Held by Vaughan Williams and Kennedy L.JJ., Buckley L.J. doubting, that, as the substitution of the P. machines went in mitigation of the damages consequent on the breach of contract, the railway company were entitled to recover from the W. Company the price paid for the P. machines; and none the less because the P. machines were so superior to those of the W. Company that it would have been to the pecuniary advantage of the railway company to have effected the substitution at their own cost even if the machines supplied had been in accordance with the contract.

Per Buckley L.J.: According to the meaning of the special case, the arbitrator had not found whether the purchase of the P. machines by the respondents was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for the respondents' pecuniary advantage; and if that were the true meaning of the special case, the claimants were entitled to have the award remitted to the arbitrator.

In an arbitration, in which the claimants claimed the balance of the price of their machines and the respondent counterclaimed for damages, the arbitrator, acting under the Arbitration Act, 1889, stated a special case for the opinion of the King's Bench Division, in which the question submitted was whether the respondents were entitled to recover from the claimants the cost of the purchase and installation of the P. machines. The King's Bench Division answered the question in the affirmative, and the arbitrator subsequently made his award, in which he incorporated the opinion expressed by the Court and adjudicated in favour of the respondents. An application was then made by the claimants to set aside the award on the ground that the opinion of the King's Bench Division was wrong, and being incorporated in the award constituted error on the face of the award; this application was refused:—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that, although the consultative opinion of the King's Bench Division was itself unappealable, the decision of the King's Bench Division refusing to set aside the award which incorporated that opinion was subject to appeal. BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY *v.* UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON - - - - - **C. A. 128**

DEBTS—Company—Sale of goods—Hypothecation of proceeds—Charge on book debts
See COMPANY. 2. **275**

—— Fraudulent conveyance — Valuable consideration - Antecedent debt — Garnishee proceedings - - - - - **474**
See FRAUDULENT CONVEYANCE.

DEED OF ASSIGNMENT—Bankruptcy
See under BANKRUPTCY.

DESERTION Order for weekly payments—Return to cohabitation — Arrears recoverable - - - - - - **91**
See HUSBAND AND WIFE.

DISEASE—Industrial disease—Workmen's compensation - - - - - - **372**
See EMPLOYER AND WORKMAN. 5.

DISTRESS *Exemption — Goods comprised in Hire-Purchase Agreement — Law of Distress Amendment Act*, 1908 (8 *Edw. 7, c.* 53), *s.* 4.

The plaintiffs let furniture to the tenant of a flat under a hire-purchase agreement which by

DISTRESS—*continued.*

clause 6 provided that "In case any of the said rent" (i.e., of the furniture) "shall be in arrear . . . . or if the said articles shall be seized or taken under colour or in pursuance of any legal process, the owners shall thereupon, without formal demand, be entitled to resume possession of the said articles . . . . ."

The hirer became in arrear with his monthly payments due under the agreement to the plaintiffs, and their solicitors wrote to him, giving him notice determining the agreement, and requiring of him an immediate appointment for the plaintiffs to send their men to remove the goods.

The defendant, as agent for the landlord of the flat, subsequently distrained upon the goods for arrears of rent due from the hirer. The plaintiffs thereupon served a declaration on the defendant under s. 1 of the Law of Distress Amendment Act, 1908, that the hirer had no right of property or beneficial interest in the goods, but the defendant refused to deliver them to the plaintiffs unless the arrears of rent of the flat were paid. The plaintiffs paid the amount of the arrears of rent under protest and brought an action in the county court to recover it back as money received by the defendant to their use, and claimed in the alternative a like sum as damages for illegal distress on their goods.

Held, that the amount was not recoverable inasmuch as the hire-purchase agreement was still in existence notwithstanding the notice contained in the letter from the plaintiffs' solicitors to the hirer. The goods were therefore comprised in a hire-purchase agreement within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and the distress was lawful.

London Furnishing Co. v. *Solomon* (1912) 28 Times L. R. 265, overruled. HACKNEY FURNISHING COMPANY *v.* WATTS - **Div. Ct. 225**

DOCK — Insurance (Marine) — Floating dock — "Seaworthiness admitted" — Non-disclosure of material fact - - **452**
See INSURANCE (MARINE). 2.

EARNINGS — "Personal earnings" [illegible] Assignment by [illegible] - **162**
See PRACTICE. 1.

[illegible] Compensation — "Average weekly earnings"
See under EMPLOYER AND WORKMAN.

EMERGENCY — [illegible]
Negligence of servant — Liability of master - - - - - **308**
See MASTER AND SERVANT. 1.

EMPLOYER AND WORKMAN — *Arbitration*—[illegible] Compensation — Liability to pay Compensation — Action in Court of Arbitration — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3.

A workman having met with an accident in the course of his employment while [illegible] being entitled to compensation for [illegible]

EMPLOYER AND WORKMAN — *continued.*

his employers paid him regularly from the date of the accident 17*s.* 6*d.* a week, being one half of his average weekly earnings. The workman appealed under the Workmen's Compensation Act, 1906, to have registered a memorandum of an agreement by the employers admitting this liability, and agreeing to pay him 17*s.* 6*d.* a week. The employers opposed on the ground that they had only agreed to pay so long as their medical adviser certified that the workman was wholly incapacitated. The county court judge held that the compensation had not been settled by agreement. The workman then applied to have the compensation settled by the judge as arbitrator under the Act:—

Held, affirming the decision of the judge, that no question had arisen as to the amount or duration of the compensation which could give jurisdiction to arbitrate, though such a question might arise hereafter if and when the employers claimed to discontinue or diminish their payments. PAYNE *v.* N. FORTESCUE & SONS, LIMITED - - - - - **C. A. 346**

2. —— *Compensation—Basis of Calculation—"Average weekly earnings"—Casual Employment—"Grade"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

A workman was [illegible] by the respondents on May 19, 1911, as a casual carter, his duty being to drive a one-horse cart. On July 27, 1911, he died from the effects of an accident arising out of and in the course of his employment. At the date of the accident and for about a fortnight before he had been working for the respondents as a casual teamster and receiving a higher wage. Upon an application by the dependants of the deceased for compensation under the Workmen's Compensation Act, 1906, the county court judge found as a fact that the workman had only been employed temporarily and casually as a teamster, and in calculating the "average weekly earnings" he took into account the total amount of wages earned by the workman, whether as a casual carter or as a casual teamster, from May 19 until his death:

Held, on appeal, that there had been no change of "grade" in the employment of the workman, and that the method of calculation adopted by the county court judge was right.

Dobson [illegible] (1912) 5 Butt. W. C. C. 405, followed. EDGE *v.* J. GOODSON, LIMITED - - - - **C. A. 360**

3. —— *Compensation—Basis of Calculation—"Average weekly earnings"—"Grade"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

A sailor who had for some time been employed in various capacities and at various rates of wages by the appellants, [illegible] as a mate by the [illegible] employed as mate on board the appellants' vessel, [illegible]

EMPLOYER AND WORKMAN—*continued.*
of his death was that of a mate, and he assessed compensation accordingly :—

Held, on appeal, that the question of what grade the man occupied was not one merely of fact upon which the decision of the county court judge was final, but it was a question of law whether, upon the facts as found, the workman occupied a grade within Sched. I., ss. 1 and 2 of the Workmen's Compensation Act, 1906.

Held, also, that the workman was at the time of his death temporarily acting as a mate, and that the county court judge must ascertain as best he could the "average weekly earnings" of the man, taking into consideration the various rates of his wages. JURY *v.* OWNERS OF S.S. "ATLANTA" - - - - - - **C. A. 366**

4. —— *Compensation—Basis of Calculation —"Average weekly earnings"—Days lost because the Employer had no Work for the Workman—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., s.* 2.

In calculating a workman's average weekly earnings for twelve months before an accident for the purpose of compensation under the Workmen's Compensation Act, 1906, weeks in which he had not work enough to employ him for the whole of every day must be taken into account. The average must be obtained by dividing the total wages earned by the number of working weeks in the year, after allowing for recognized holidays and interruptions by fortuitous accidents. WHITE *v.* WISEMAN **C. A. 352**

5. —— *Compensation—Industrial Disease—Increased Susceptibility—Nystagmus—Sequela—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 ; *Sched. III.*

On application by employers for a review of a weekly payment under the Workmen's Compensation Act, 1906, it appeared that the compensation had been awarded in respect of an industrial disease, and the county court judge held that although the applicant was no longer suffering from the disease he was unable to do his former work because of his increased susceptibility to the disease owing to his first attack, and that he was therefore still entitled to compensation :—

Held, on this finding, that the effects of the accident, that is of the industrial disease, still continued to exist, and the applicant was entitled to compensation. GARNANT ANTHRACITE COLLIERIES, LIMITED *v.* REES - **C. A. 372**

—— Negligence of servant—Liability of master —Implied authority of servant—Emergency - - - - - **308**
See MASTER AND SERVANT. 1.

—— Negligence of servant—Scope of employment—Servant acting under authorized order of general manager—Liability of master - - - - - - - **588**
See MASTER AND SERVANT. 2.

ESTOPPEL—Bankruptcy—Petition—Suspension of payment—Proposed deed of assignment—Assent of creditor—Revocation—Joint petition - - - **234**
See BANKRUPTCY. 3.

EXECUTION—Bankruptcy notice—Judgment in county court—No order for payment by instalments — Payment into Court of part of debt—Bankruptcy notice for full amount - - - - - - **1**
See BANKRUPTCY. 2.

EXTRADITION — "*Committed to prison*" — *Arrest under Warrant — Proceedings before Magistrate pending—Lapse of Two Months after Arrest—Right of Prisoner to Release—Extradition Treaty of* 1876 *with France, art.* 10.

By art. 10 of the Extradition Treaty of 1876 between the United Kingdom and France, "if the fugitive criminal who has been committed to prison be not surrendered and conveyed away within two months after such committal, or within two months after the decision of the Court upon the return to a writ of habeas corpus in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shown to the contrary" :—

Held, that "committed to prison" meant the committal of the accused person to prison by the magistrate, upon the conclusion of the proceedings before him, to await the warrant of the Secretary of State for his extradition, and did not mean the arrest of the accused under the warrant issued by the magistrate in the first instance ; and therefore the accused is not entitled to be discharged from custody merely because he has not been surrendered and conveyed away within two months after his arrest under the magistrate's warrant. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* MEHAMED BEN ROMDAN - - **Div. Ct. 190**

—— France—Extradition Treaty of 1876 with France, art. 10 - - - - - **190**
See EXTRADITION (above).

—— Germany — Extradition Treaty with Germany, 1872, Articles II., IV., and XV.—Money won by cheating at cards
See CRIMINAL LAW. 2. **424**

FACTORY—*Laundry—Laundry carried on incidentally to the Purposes of a Public Institution —"Public Institution"—Factory and Workshop Act*, 1907 (7 *Edw.* 7, *c.* 39), *s.* 1.

The Royal Masonic Institution for Boys was a school for boys. One of the buildings was used as a laundry for washing the clothes of the inmates, the machinery being driven by mechanical power ; and six resident servants were employed to work therein.

This institution was almost entirely maintained by the subscriptions of Freemasons. No appeal for funds was made to the general public, but voluntary subscriptions were received from members of the general public which amounted only to about one-quarter per cent. of the total subscriptions. The accounts were not published publicly, but only in a book for the use of subscribers. The election of boys to the institution was confined to sons of subscribing Freemasons : the election was by the vote of subscribers according to the amount of their subscriptions. All subscribers of certain amounts were life governors and were members of the general

FACTORY—*continued.*
council, which had absolute power to grant or refuse the application of any candidate for election. The management was in the board of management, consisting of thirty Freemasons who were life governors. In the year 1910 the institution received a grant of 654*l.* from the Board of Education as a secondary school. The grounds and premises were strictly private, and no one was admitted without permission of the secretary :—

Held, that the institution was a "public institution" within the meaning of s. 1 of the Factory and Workshop Act, 1907, which applies the provisions of the Factory and Workshop Act, 1901, to laundries "carried on incidentally to the purposes of any public institution." ROYAL MASONIC INSTITUTION FOR BOYS (TRUSTEES OF) *v.* PARKES - - **Div. Ct. 212**

2. —— "*Manufacturing Process*" *carried on in Premises — Carpet Beating — Non-Textile Factory—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1 (*b*); *Sixth Schedule, Part II., clause* 28.

By s. 149, sub-s. 1 (*b*), of the Factory and Workshop Act, 1901, the expression "non-textile factory" means "any premises . . . . named in Part Two of the" Sixth Schedule to the Act "wherein . . . . mechanical power is used in aid of the manufacturing process carried on there."

Clause 28 of Part II. of the Sixth Schedule to the Act names (inter alia) carpet beating works :—

Held, that premises in which carpets are beaten by the aid of mechanical power are a factory within the meaning of the Act inasmuch as carpet beating is a "manufacturing process" within the definition contained in s. 149, sub-s. 1 (*b*), read together with clause 28 of Part II. of the Sixth Schedule.

Owner v. *Cottingham Sanitary Steam Laundry Co.* (1910) 102 L. T. 571, and *Royal Masonic Institution for Boys* (*Trustees of*) *v. Parkes* [1912] 3 K. B. 212, followed. JOHNSTON *v.* LALONDE BROTHERS & PARHAM - **Div. Ct. 218**

FALSE PRETENCES—Obtaining money by—Extradition Treaty with Germany, 1872—Money won by cheating at cards—Habeas corpus—Second writ - **424**
See CRIMINAL LAW. 2.

—— Obtaining money by—"Three card trick" **568**
See CRIMINAL LAW. 5.

FINANCE ACTS
See REVENUE.

FRANCE — Extradition Treaty of 1876 with France, art. 10 - - - - - **190**
See EXTRADITION.

FRAUDULENT CONVEYANCE — Fraudulent Conveyance—Valuable Consideration—Antecedent Debt—13 *Eliz. c.* 5, *s.* 6—Garnishee Proceedings.

Mrs. G. was plaintiff in an action against H. for false representation, and was also plaintiff in the present action against the defendant for slander. Mrs. G., being at the time largely indebted to her husband, on May 21, 1910, executed in his favour a deed of assignment, whereby, after reciting that he had requested her to give him further security which she had agreed to do, she assigned to him "all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the said action or otherwise howsoever, under or by reason of the same to hold the same . . . . subject to redemption on payment of all moneys due to him." Subsequently the action brought by Mrs. G. against H. was dismissed with costs amounting to 218*l.*, but the action brought by Mrs. G. against the defendant resulted in a verdict for the plaintiff for 200*l.* with costs. H. thereupon instituted garnishee proceedings against the defendant to attach the amount of damages recovered by Mrs. G. in satisfaction of the costs due to him in the first action, and in these proceedings Mrs. G.'s husband also claimed to be entitled to those damages under the assignment from his wife to him :—

Held, first, that the assignment was made for good consideration, and, secondly, that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property, that is, of the fruits of an action as and when recovered, and that it was consequently not void under 13 Eliz. c. 5.

Decision of Divisional Court reversed. GLEGG *v.* BROMLEY - - - - - - **C. A. 474**

FREIGHT—Insurance (Marine).
See under INSURANCE (MARINE).

—— Shipping.
See under SHIPPING.

GAMING—Money won by cheating at cards - Obtaining money by false pretences - Extradition Treaty with Germany, 1872 — Habeas corpus—Second writ - **424**
See CRIMINAL LAW. 2.

—— "Three card trick"—Obtaining money by false pretences - - - **568**
See CRIMINAL LAW. 5.

GARNISHEE — Fraudulent conveyance — Valuable consideration—Antecedent debt - Garnishee proceedings - - **474**
See FRAUDULENT CONVEYANCE.

GET UP — Passing-off Action - - **76**
See PASSING-OFF ACTION.

GOODS—Sale of
See SALE OF GOODS.

"GRADE" - Workmen's compensation **360 366**
See EMPLOYER AND WORKMAN. 2, 3.

HABEAS CORPUS—Second writ—Money won by cheating at cards—Obtaining money by false pretences—Extradition Treaty with Germany, 1872 - - - 424
See CRIMINAL LAW. 2.

—— "Three card trick"—Obtaining money by false pretences - - - - 568
See CRIMINAL LAW. 5.

HIRE-PURCHASE AGREEMENT—Goods comprised in—Distress—Exemption - 225
See DISTRESS.

HUSBAND AND WIFE—*Desertion—Order for Weekly Payments—Return to Cohabitation—Arrears recoverable — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 7, 8, 9—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 54—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, any married woman whose husband has deserted her may apply to a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which the cause of complaint has arisen, for an order under the Act. By s. 5 the Court to which application is made may make an order containing (*a*) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty); (*c*) a provision that the husband shall pay such weekly sum not exceeding two pounds as the Court shall consider reasonable.

By s. 7 a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any order under the Act has been made may, on the application of the married woman or of her husband and upon cause being shewn upon fresh evidence, alter or discharge any such order. If any married woman upon whose application an order is made under the Act voluntarily resumes cohabitation with her husband the order upon proof thereof is to be discharged.

By s. 8 all applications under the Act are to be made in accordance with the Summary Jurisdiction Acts. By s. 9 the payment of any sum of money directed to be paid by any order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation, that is to say, under s. 4 of the Bastardy Laws Amendment Act, 1872, by distress, and in default of sufficient distress by warrant of committal to gaol for the term therein specified unless the sum due under the order of affiliation with costs be sooner paid.

By the Summary Jurisdiction Act, 1879, s. 54, the Act is to apply to the levying of sums adjudged to be paid under an order enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums as if an order so enforceable were a conviction on information. The Act is to be construed as one with the Summary Jurisdiction Act, 1848. By s. 11 of the last-named Act, in

HUSBAND AND WIFE—*continued.*

all cases where no time is specified for making or laying a complaint or information in the Act relating to the particular case, the complaint is to be made and the information laid within six calendar months from the time when the matter of the complaint or information arose.

A married woman having been deserted by her husband obtained from a stipendiary magistrate an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, directing her husband to pay a weekly sum for her maintenance. After the date of this order, namely, on November 17, 1906, and at various dates down to February, 1907, the parties resumed cohabitation. On December 1, 1911, the husband was brought before justices on the information of the wife, who alleged that a sum of 97*l.* 4*s.* had accrued due in respect of arrears of weekly payments. This sum had accrued since November 17, 1906. The justices made an order committing the husband in default of distress to imprisonment for three months, unless all the arrears were sooner paid or satisfied:—

Held, that the committal was bad because no more than six calendar months' arrears were recoverable.

Held, also, *per* Lord Alverstone C.J. and Pickford J. (Avory J. not assenting), that the return to cohabitation did not of itself annul the order for weekly payments, but that the order remained in force until discharged under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. MATTHEWS *v.* MATTHEWS
Div. Ct. 91

HYPOTHECATION—Sale of goods—Hypothecation of proceeds—Charge on book debts
See COMPANY. 2. 275

INCOME TAX.
See REVENUE.

INDECENT ASSAULT.
See ASSAULT.

INDUSTRIAL DISEASE—Workmen's compensation - - - - - - - 372
See EMPLOYER AND WORKMAN. 5.

INFANT—Criminal law—Sufficiency of indictment—Indecent assault on girl under thirteen—Absence of averment of age of girl - - - - - - - 341
See CRIMINAL LAW. 4.

INLAND REVENUE.
See REVENUE.

INSTALMENTS — Bankruptcy notice — Judgment in county court—No order for payment by instalments - - - 1
See BANKRUPTCY. 2.

"**INSTITUTE TIME CLAUSES**" — Policy on freight—Subrogation - - - 315
See INSURANCE (MARINE). 4.

INSURANCE (MARINE)—*Concealment—Assignment—Assignee for Value without Notice—Defence arising out of the Contract—Marine*

INSURANCE (MARINE)—*continued.*

Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 50, *sub-s.* 2.

By s. 50, sub-s. 2, of the Marine Insurance Act, 1906, where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

A firm of shipbuilders agreed to build a vessel for certain shipowners. As security for the purchase-money and in pursuance of a covenant to that effect the owners insured the vessel with certain underwriters and assigned the policy to the builders. Material facts known to the owners but unknown to the builders were not disclosed to the underwriters.

In an action on the policy by the builders as assignees of the policy against the underwriters, the latter pleaded the non-disclosure:—

Held, that the non-disclosure of material facts, being a breach of a condition precedent to the liability of underwriters on a marine policy, was a defence arising out of the contract within the meaning of the above enactment, and available to the underwriters even against the claim of bona fide assignees for value of the policy who had no notice of the non-disclosure. WILLIAM PICKERSGILL & SONS, LIMITED *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED - **Hamilton J. 614**

2. —— *Floating Dock — "Seaworthiness admitted" — Non-disclosure of Material Fact — Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 17, 18.

The owners of a floating dock insured it against loss on a voyage by sea, the policy containing the words "seaworthiness admitted." The dock was in sound condition as a dock, but in order to make it seaworthy for the voyage it required special strengthening. It was not in fact so strengthened, the owners honestly believing that such strengthening was unnecessary, and that it was capable of being safely towed to its destination without it. The dock was lost on the voyage. In an action on the policy the underwriters contended that the fact that the dock had not been strengthened was a material circumstance the non-disclosure of which avoided the policy —

Held, that as the underwriters knew that the subject-matter of the insurance was a floating dock and therefore not an ordinary seagoing vessel, they were by the insertion in the policy of the words "seaworthiness admitted" put on inquiry as to its construction, and in the absence of inquiry the owners were not bound to disclose the want of special strengthening.

Per Buckley L.J. The question whether the dock required to be specially strengthened for the voyage was not a question of fact but of opinion, and in the circumstances the fact that the dock had not been strengthened was not a material circumstance which the owners were bound to disclose.

INSURANCE (MARINE)—*continued.*

Judgment of Scrutton J. [1912] 2 K. B. 112, affirmed.

CANTIERE MECCANICO BRINDISINO *v.* JANSON - - - - - - - **C. A. 452**

3. —— *"Freight chartered or as if chartered" —Contract to supply Cargo—Loss of Freight—Time Penalty Clause—Special Charter—Cancelling Date—Non-disclosure—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 18.

The plaintiffs, three shipowning companies, ran in combination a line of steamers between the United Kingdom and Australia, advertising the dates when the various steamers were expected to arrive at the various Australian ports. The steamers were not chartered, but the plaintiffs' shipping agents, who had control of large quantities of refrigerated and other cargo in Australia, made contracts with the plaintiffs to load such cargo on their steamers.

By one of these contracts Messrs. B. & Co. of Sydney agreed that all refrigerated cargo owned or controlled by them should, so far as there was available space, be shipped on the plaintiffs' steamers.

By another contract the plaintiffs agreed with Messrs. J. & Co. of Hobart to have one of their steamers, the *Ayrshire*, at Hobart on or about March 20, 1910, ready to load 40,000 cases of apples.

The plaintiffs effected with the defendants a policy of insurance "upon freight of frozen meat and/or apples and/or other refrigerated produce valued at 15,000*l.* Chartered or as if chartered . . . . Clauses as attached. Of the ship or the vessel called *Ayrshire* . . . . at and from any ports or places . . . . in the United Kingdom to any ports or places . . . . in Australia and/or Tasmania . . ." The risks included perils of the sea.

The policy contained a time penalty clause as follows: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date."

The apple season at Hobart is confined to the months of March and April. The fact that by the contract with J. & Co. the plaintiffs had agreed to have the *Ayrshire* at Hobart on or about March 20, 1910, was not known to the defendants.

The *Ayrshire* started on her advertised voyage outward on January 1, 1910. On January 2 she met with a peril of the sea and was incapacitated from continuing the voyage. The greater part of the cargo which the *Ayrshire* would have loaded was taken by the steamer next in order on the advertised list, the rest being taken by another vessel in which the plaintiffs were interested. On March 17 the *Ayrshire* set sail and reached Australian waters early in June, when she loaded and earned freight upon a full cargo. The plaintiffs lost the amount of freight which could have been earned by one extra homeward sailing.

As to the contracts with B. & Co. and J. & Co.:—

Held, that the effect of each of these contracts

INSURANCE (MARINE)—*continued.*
was to give the plaintiffs an insurable interest in "freight as if chartered" within the meaning of the policy.

As to B. & Co.'s contract.

Held, following *Everth* v. *Smith* (1814) 2 M. & S. 278, that there was no loss of this freight.

As to J. & Co.'s contract :—

Held, (1.) that there was a loss of the freight ;

(2.) That this contract was not a special charter containing a cancelling date within the meaning of the policy ; but

(3.) That there was non-disclosure of a material circumstance within the meaning of s. 18 of the Marine Insurance Act, 1906, in that the defendants were not informed that the *Ayrshire* was due to arrive at Hobart on or about March 20, 1910 ; and

(4.) That this non-disclosure avoided the policy. SCOTTISH SHIRE LINE, LIMITED *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY, LIMITED **Hamilton J. 51**

4. —— *Policy on Freight—"Institute Time Clauses"—Constructive Total Loss of Ship—Freight earned after Casualty—Right of Insurer to Benefit of Freight—Subrogation.*

The words "in full" in the clause of the Institute Time Clauses—Freight—1910, which provides that "In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or not chartered," do not mean "without benefit of salvage."

The plaintiff insured the hull of his ship under a time policy by which in the event of a constructive total loss the underwriters were to make no claim for freight whether notice of abandonment was given or not. He also insured the freight of the ship with other underwriters under a time policy containing the clause of the Institute Time Clauses—Freight—above set out. The ship while on a voyage during the currency of the policies stranded and became a constructive total loss. She was, however, towed in her damaged condition to her destination, where her cargo was discharged, and the freight (being less than the amount at which the freight was valued in the policy) was paid to the plaintiff. In an action on the policy on freight :—

Held, that the provision in the hull policy prevented the ordinary rule of law, by which in the event of a constructive total loss the right to the freight earned subsequently to the loss passes to the underwriters on hull, from applying, and that the defendants were entitled to a deduction in respect of the freight received by the plaintiff. COKER *v.* BOLTON - - **Hamilton J. 315**

ISSUE—Costs—Trial before official referee—Separate issues - - - **155**
See PRACTICE. 2.

JUDGMENT—"Final judgment"—Bankruptcy notice—Judgment or order - **242**
See BANKRUPTCY. 1.

JURISDICTON—Desertion—Order for weekly payments — Return to cohabitation — Arrears recoverable—Summary jurisdiction - - - - - - - **91**
See HUSBAND AND WIFE.

—— Justices.
See JUSTICES.

JUSTICES—Bastardy—Non-service of summons—Subsequent marriage of mother **249**
See BASTARDY.

—— Bread—Carrying out bread for sale—"Cart or other carriage"—Bicycle with basket attached—Absence of scales and weights
See BREAD. **625**

—— Criminal law.
See CRIMINAL LAW.

—— Desertion—Order for weekly payments—Return to cohabitation—Arrears recoverable—Summary jurisdiction **91**
See HUSBAND AND WIFE.

—— Factory and workshop.
See under FACTORY.

—— Licensing Acts.
See LICENSING ACTS.

—— London — Offences — Prosecution — Condition precedent — Condemnation by justice of the peace - - - **35**
See LONDON. 2.

—— Milk—Carrying on trade of purveyor of milk—Sale of milk at railway station buffet—Necessity of registration **576**
See MILK.

—— Waterworks—Breaking-up streets—Laying waterpipes therein—Subsequent subsidence of street—Cost of repair - **493**
See WATER. 2.

LANDLORD AND TENANT—*Lease—Assignment of Reversion—Lease by Assignee—Attornment—Privity—4 & 5 Ann. c. 3 (c. 16 in the common printed Editions), s. 9.*

By 4 & 5 Ann. c. 3 (commonly known as c. 16), s. 9, all grants or conveyances by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending as if their attornment had been had and made. By s. 10 it is provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee.

Certain owners of land made a lease to the plaintiff for three years. They then assigned their reversion. The assignees of the reversion

LANDLORD AND TENANT —*continued.*

made a lease to the defendant to take effect in præsenti for twenty-one years.

A quarter's rent being unpaid by the defendant:—

Held, that by virtue of the above enactment the plaintiff could sue the defendant before attornment for the quarter's rent.

Edwards v. *Wickwar* (1866) L. R. 1 Eq. 403 not followed. HICKS v. BEARD
Div. Ct. 181

2. —— *Lease—Lessor's Covenant—Covenant not to let "any of the adjoining shops" for certain specified Purposes—Meaning of "adjoining."*

The defendant, being the owner of certain house property, which included five shops, numbered 2 to 6, Limes Parade, let to the plaintiffs the shop No. 4, Limes Parade for twenty-one years, the lessor covenanting that he would not at any time during the continuance of the lease let "any of the adjoining shops belonging to me on the Limes Estate," for the purpose of the businesses of upholsterers, cabinet makers, furniture dealers, or French polishers. Subsequently, during the continuance of the lease, the defendant let to a tenant the shop No. 6, Limes Parade for a term of twenty-one years for the purpose of carrying on the business (inter alia) of a cabinet maker:—

Held by Fletcher Moulton L.J. and Buckley L.J. (Vaughan Williams L.J. dissenting), that the word "adjoining" was not confined to the two shops physically in contact with the demised shop, but that it extended to No. 6, and that there had therefore been a breach of the defendant's covenant in respect of which the plaintiffs were entitled to recover damages.

Decision of Phillimore J., [1912] W. N. 19, affirmed. CAVE v. HORSELL - - C. A. 533

LANDS CLAUSES ACTS—Railway (Light)—Compulsory purchase—Assessment of compensation—Award—Mandamus to take up award - - - - - 72
See RAILWAY.

LAUNDRY—Factory and Workshop Acts—"Public institution" - - 212
See FACTORY. 1.

LEASE—Landlord and tenant.
See LANDLORD AND TENANT.

LICENCE—Licensing Acts.
See LICENSING ACTS.

LICENSING ACTS—*General Annual Licensing Meeting—New Off-Licence—Conditional Grant—Restrictions on User—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 14.

On an application for a new off-licence [illegible] at a general annual licensing meeting have no power to grant a licence subject to conditions; but they may ascertain from the applicant whether he consents to restrictions, being reasonable and proper restrictions, upon the user of the premises licensed, and they may grant or refuse the licence accordingly according as he consents or refuses to submit to the restrictions. THE KING v. [illegible] (BIRMINGHAM LICENSING JUSTICES). *Ex parte* Hughes - - - - Div. Ct. 583

LICENSING ACTS —*continued.*

—— Duty — Retailer's on-licence — Annual licence value — Brewers' profits—Deductions—"Increased value" from sale of non-intoxicants - - 377
See REVENUE. 2.

LIGHT RAILWAYS.
See RAILWAY.

LOCAL AUTHORITY [illegible]—*Statutory Authority—Obstruction of Access to House and Shop—Right of Occupier to Compensation—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 308—"*Damage.*"

The mere temporary obstruction of access to premises, causing considerable inconvenience and loss of business to the occupier, may constitute "damage" in respect of which he is entitled to claim compensation under s. 308 of the Public Health Act, 1875.

Herring v. *Metropolitan Board of Works* (1865) 19 C. B. (N.S.) 510, distinguished.

Per Fletcher Moulton L.J.: *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 510, should be treated as overruled. LINGKÉ v. CHRISTCHURCH CORPORATION - C. A. 595

LONDON—*Building—Party Wall—Dispute as to Method of repairing Defective Party Wall—Previous History of Wall—London Building Act*, 1894 (57 & 58 *Vict. c.* ccxiii.), *ss.* 88, 90, 91.

The tribunal adjudicating under the London Building Act, 1894, upon a dispute between a building owner and an adjoining owner as to the mode of repairing a defective party wall is not entitled to take into consideration the history of the wall previous to its becoming a party wall. MINTURN v. BARRY - - - C. A. 510

2. —— *Offences—Unsound Fish intended for Food of Man—Prosecution—Condition Precedent—Condemnation by Justice of the Peace—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-s.* 2.

By s. 47, sub-s. 2, of the Public Health (London) Act, 1891, "if it appears to any justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same . . . .; and the person . . . . on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for ever parcel thereof so condemned, or at the discretion of the Court, without the infliction of a fine, to imprisonment, for a term of not more than six months, with or without hard labour":—

Held (Pickford J. dissenting), that the words "so condemned" must be read as "so liable to be condemned," and that therefore condemnation by a justice of the peace of an animal or article which has been seized or is liable to be seized under the section is not a condition precedent to a summary conviction for an offence under the sub-section. HEWETT v. HATTERSLEY
Div. Ct. 36

MAGISTRATES
See JUSTICES.

MANDAMUS—*Prerogative Writ—Enforcement of duty to repair Bridge—Vagueness of Duty—Return to Writ.*

Upon the argument of a rule nisi for a writ of mandamus to the respondents to repair a bridge it was contended by them (inter alia) that the duty of repairing a bridge was too vague to be enforced by prerogative writ of mandamus :—

Held, that the rule would be made absolute, leaving the respondents to raise the question, if they thought fit, upon the return to the writ. THE KING *v.* WILTS AND BERKS CANAL COMPANY - - - - - - **Div. Ct. 623**

—— Company — Registration — Name of proposed company—Refusal of registrar to register - - - - - **23**
See COMPANY. 1.

—— Railway (Light)—Compulsory purchase—Assessment of compensation—Award—Mandamus to take up award - - **72**
See RAILWAY.

—— Voters, Lists of—Jurisdiction of Court to order revising barrister to correct mistake—Lists destroyed - - **518**
See PARLIAMENT.

MARINE INSURANCE.
See INSURANCE (MARINE).

MARRIED WOMAN.
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Implied Authority of Servant—Emergency—Negligence of Servant—Liability of Master.*

The plaintiff at the request of a servant of the defendant got into the defendant's cart, which was then in the charge of the servant, in order to render assistance to another servant of the defendant who had been rendered unconscious by an accident. The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart in causing the horse to start. In an action against the defendant for damages for the injuries sustained by the plaintiff :—

Held, that the existence of an emergency gave no implied authority to the servant to invite the plaintiff into the cart, and that the defendant was not liable to the plaintiff. *Cox* v. *Midland Counties Ry. Co.* (1849) 3 Ex. 268, followed. HOUGHTON *v.* PILKINGTON **Div. Ct. 308**

2. —— *Negligence of Servant—Scope of Employment—Servant acting under unauthorized Order of General Manager—Liability of Master.*

The defendants were the proprietors of taxi-cabs which they let out on hire. By an agreement with one of their customers one of their cabs was appropriated to his exclusive use. A driver in their employment, by the order of their general manager, whose orders it was the duty of the driver to obey, drove him in that cab upon his private business. The general manager had no authority to use the cab for that purpose, but the driver had no reason to suppose that his order

MASTER AND SERVANT—*continued.*

was an improper one. The plaintiff was injured by the negligence of the driver while driving the cab :—

Held, that the driver was acting within the scope of his employment while so driving the cab, and that the defendants were liable for his negligence. IRWIN *v.* WATERLOO TAXI-CAB COMPANY, LIMITED - - **C. A. 588**

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

MILK—*Carrying on Trade of Purveyor of Milk—Sale of Milk at Railway Station Buffet—Necessity of Registration—Dairies, Cowsheds, and Milkshops Order*, 1885, *art.* 6.

The keepers of a refreshment room at a railway station in the course of their business sold milk by the glass to such of their customers as asked for it. The amount so sold by them did not exceed three or four glasses per week :—

Held, that they did not "carry on the trade of a purveyor of milk" within the meaning of art. 6 of the Dairies, Cowsheds, and Milkshops Order, 1885, so as to require registration thereunder. SPIERS & POND, LIMITED *v.* GREEN **Div. Ct. 576**

MISTAKE—Voters, Lists of — Jurisdiction of Court to order revising barrister to correct mistake — Lists destroyed — Mandamus - - - - - **518**
See PARLIAMENT.

NAME — Company — Registration — Name of proposed company—Similarity to name of company already registered—Refusal of registrar to register—Mandamus **23**
See COMPANY. 1

NEGLIGENCE—*Savage Animal — Liability of Owner—Duty towards Licensees—Remoteness of Damage.*

The plaintiff, accompanied by her husband and carrying a pet dog, entered a tea shop by permission of the defendants, the proprietors thereof. On the premises was a cat which had kittens. The cat had been shut up in a store room, but had escaped. The plaintiff put her dog on the floor. The cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband. The cat sprang on her and bit her arm. Evidence was given that cats rearing kittens are inclined to be savage and in a vicious state, even if gentle otherwise ; and that if such a cat smelt the clothing of a person who had been carrying a dog it might attack that person.

In an action for injuries to the plaintiff and to her dog :—

Held, that the defendants were not liable, either (1.) as keepers of an animal feræ naturæ, or of an animal mansuetæ naturæ but known to be vicious towards mankind ; or (2.) as licensors.

Held, also, that the defendants were not bound to contemplate the injuries as the consequence of keeping the cat. CLINTON *v.* J. LYONS & COMPANY - - - **Div. Ct. 198**

NEGLIGENCE—*continued.*

—— Master and servant—Implied undertaking of servant—Emergency—Negligence of servant—Liability of master - 308
See MASTER AND SERVANT. 1.

—— Negligence of servant—Scope of employment—Servant acting under unauthorized order of general manager—Liability of master - - - 588
See MASTER AND SERVANT. 2.

NOTICE—Bankruptcy notice—"Final judgment"—Judgment or order - 242
See BANKRUPTCY. 1.

—— Bankruptcy notice—Judgment in county court—Payment into Court of part of debt—Execution—Practice. - 1
See BANKRUPTCY. 2.

—— Concealment—Assignment—Assignee for value without notice—Defence arising out of the contract - - - 614
See INSURANCE (MARINE). 1.

—— Purchaser for value without notice—Voluntary settlement—Bankruptcy of settlor—Sale by voluntary donee after act of bankruptcy—Title of trustee 6
See BANKRUPTCY. 4.

OFFENCES—London.
See under LONDON.

OFFENCES AGAINST THE PERSON ACT. 1891
See CRIMINAL LAW. 4. 341

PARLIAMENT—*Revising barrister—Lists of voters—Omission to engross Votes wrongfully struck off to—Omission through Inadvertence—Lists transmitted to Town Clerk—Erasure struck from Lists—Jurisdiction of Court to order Revising Barrister to correct Mistake—Lists destroyed—Mandamus—Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), ss. 41, 47, 48.*

A revising barrister for a parliamentary borough, owing to an accident to his right hand, [illegible] upon the [illegible] as pronounced orally in Court. By some inadvertence the clerk omitted to strike off the lists the names of some persons who had been successfully objected to and whose names were ordered by the revising barrister to be expunged. The lists with those names remaining on [illegible] delivered by the revising barrister to the town clerk, and the names were accordingly printed in the register of electors for the borough. The mistake was not discovered until the [illegible] of some months after the register had come into operation. The original lists of voters which had been before the revising barrister were either lost or destroyed:—

Held, that the Court had jurisdiction to grant writs of mandamus to the revising barrister and to the town clerk to have the mistake corrected; that in the circumstances there need not be a previous demand and refusal to do the act sought to be enforced; and that the proper course was

PARLIAMENT—*continued.*

[illegible] on a copy of the register and to deliver the same to the town clerk, and for the town clerk to make the necessary corrections in the register. THE KING *v.* HANLEY REVISING BARRISTER. THE KING *v.* STOKE-ON-TRENT TOWN CLERK
Div. Ct. 518

PARTY WALL—Dispute as to method of repairing [illegible] party wall—Previous history of wall - - - - 510
See LONDON. 1.

PASSING-OFF ACTION—*Sole Agent for Sale of Article made by a particular Manufacturer—Alleged Imitation of "Get-up" of that Article by another Manufacturer—Claim of Injunction by Agent—Absence of Evidence of any "Get-up" of the Article which has become associated with Agent—Claim for passing off not maintainable.*

[illegible] by a particular manufacturer cannot maintain a passing-off action against a person who passes off an article made by himself as the article made by the manufacturer merely on the ground that his, the agent's, profits through sale of that article are thereby diminished.

A firm were the sole agents for sale in this country of an article made by a particular manufacturer in the United States. They sold the article just as it was made and got up by that manufacturer, and nothing in the "get-up" of the article as sold by them indicated that [illegible] of them in their business sold that article. A company having manufactured and sold articles of the same kind with a "get-up" alleged by the firm to be similar to that of the [illegible] manufactured article supplied by the manufacturer in the United States, the firm sued that company for passing off those articles as articles sold by the firm:—

Held, affirming the judgment of Pickford J., that they could not maintain such an action against the company.

Semble, that, if the firm had sold the article under any "get-up" of their own, which the company had imitated, they might have maintained a passing-off action against the company.

Judgment of Kay J. in *Richards* v. *Butcher* (1890) 7 Rep. Pat. Cas. 288, followed.

DENTAL MANUFACTURING COMPANY, LIMITED *v.* C. DE TREY & CO. - - C. A. 76

PLEDGE—[illegible] for particular sum—Pledge of shares for lesser sum—Blank transfer—Notice of limitation of [illegible] principal - - - - - 282
See PRINCIPAL AND AGENT.

PLYMOUTH—Plymouth Corporation Water and Marsh[illegible] - 301
See WATER. 1.

POLICY—Insurance (Marine).
See INSURANCE (MARINE).

PRACTICE — *Costs — Security for Costs — Nominal Plaintiff—Action by Bankrupt—Cause of Action arising after Bankruptcy—"Personal Earnings"—Intervention of Trustee.*

The plaintiff, while an undischarged bankrupt, earned his living as a commission agent, and obtained from the defendants a commission note under which he was to be paid 60*l.* if he procured a certain loan for them. The whole or part of the 60*l.* would be required for the bankrupt's maintenance. The trustee in the plaintiff's bankruptcy gave notice to the defendants that he claimed any money payable to the plaintiff under the commission note, but subsequently gave them notice of withdrawal of his claim. The defendants applied for an order that the plaintiff should give security for the costs of the action on the ground that he was merely a nominal plaintiff suing for the benefit of the trustee :—

Held, that the money claimed by the bankrupt was his "personal earnings," and was therefore excepted from the property passing to his trustee in bankruptcy, and that, as the whole or part of it was required for his maintenance, he was not a mere nominal plaintiff and could not be ordered to give security for costs. AFFLECK *v.* HAMMOND - - - **C. A. 162**

2. —— *Costs—Trial before Official Referee—Separate Issues—Issue on which Plaintiff succeeds held Statute-barred—No Order affecting Costs of Issue—Plaintiff held entitled to Costs of Issue—Rules of the Supreme Court, Order* LXV., r. 1.

The plaintiff, a builder, sued the defendant to recover the balance of the contract price of a house, and the defendant pleaded, first, that the work had been unsatisfactorily carried out and that there was no balance due, and, secondly, that the action was barred by the Statute of Limitations. At the trial of the action the official referee found that the plaintiff was on a named date entitled to maintain the action for a named amount, but that the Statute of Limitations was a bar to his right to maintain the action. He accordingly directed judgment to be entered for the defendant, and that the defendant should recover from the plaintiff the costs of the action, except so far as they might have been increased by any defence other than that of the Statute of Limitations. Upon taxation the taxing Master held that the plaintiff was entitled to the costs of the issue upon which he had succeeded :—

Held, that the plaintiff, having succeeded in establishing that a debt was due to him, had succeeded in an "event" within the meaning of Order LXV., r. 1, and was therefore entitled to the costs of that issue. SLATFORD *v.* ERLEBACH **C. A. 155**

PREROGATIVE WRIT—Mandamus.
See MANDAMUS.

PRINCIPAL AND AGENT—*Authority of Agent to borrow—Authority of Agent to pledge Shares for particular Sum—Pledge of Shares for lesser Sum—Blank Transfer—Notice of Limitation of Authority—Liability of Principal.*

The registered holder of shares in a public company handed to an agent the indicia of title together with a transfer of the shares signed in blank, and instructed him to borrow not less than a certain sum on the security of the shares. The agent, in defiance of his instructions, borrowed upon the shares a less sum than the stipulated amount :—

Held that, as against the principal, the lender was entitled to retain the indicia of title to the shares until repayment of the amount of his loan.

France v. *Clark* (1884) 26 Ch. D. 257, distinguished.

Brocklesby v. *Temperance Permanent Building Society*, [1895] A. C. 173, applied. FRY *v.* SMELLIE - - - - - - **C. A. 282**

PROSECUTION—Condition precedent—Offences—Condemnation by justice of the peace - - - - - - - **35**
See LONDON. 2.

PUBLIC HEALTH — Local authority — Work executed under statutory authority—Obstruction of access to house and shop—Right of occupier to compensation
See LOCAL AUTHORITY. **595**

PUBLIC HEALTH (LONDON)—Offences—Condition precedent - - - - **35**
See LONDON. 2.

PURCHASER—Vendor and.
See VENDOR AND PURCHASER.

RAILWAY — *Light Railway — Compulsory Purchase—Assessment of Compensation—Award—Mandamus to take up Award—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 35, 121—*Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49)—*Light Railways Act*, 1896 (59 *&* 60 *Vict. c.* 48), *s.* 13.

By s. 13, sub-s. 1, of the Light Railways Act, 1896, where any order under the Act incorporates the Lands Clauses Acts, any matter which under those Acts may be determined by the verdict of a jury, by arbitration, or by two justices shall for the purposes of the order be referred to and determined by a single arbitrator, and the provisions of the Act shall apply with respect to the determination of any such matter in lieu of those of the Lands Clauses Acts relating thereto. By sub-s. 3 the Arbitration Act, 1889, shall apply to any arbitration under this section.

A light railway company under the powers conferred by an order made under the Light Railways Act, 1896, and incorporating the Lands Clauses Acts, took compulsorily certain lands in the occupation of a tenant from year to year. A single arbitrator was appointed under s. 121 of the Lands Clauses Consolidation Act, 1845, as amended by s. 13 of the Light Railways Act, 1896, to assess the amount of compensation payable in respect of the tenant's interest. The arbitrator duly made his award and tendered it to the company under s. 35 of the Lands Clauses Consolidation Act, 1845. The company refused to take up the award on the ground that the matter was governed by the Arbitration Act,

RAILWAY—*continued.*
1889, and not by the Lands Clauses Consolidation Act, 1845 :—
Held, that s. 13 of the Light Railways Act, 1896, affected only the assessment of the amount of compensation ; that the process of enforcing the award remained, as formerly, under the Lands Clauses Consolidation Act, 1845 ; and consequently that a writ of mandamus would issue ordering the light railway company to take up the award. THE KING *v.* BARTON AND IMMINGHAM LIGHT RAILWAY COMPANY. *Ex parte* SIMON - - - Div. Ct. 72

—— Carrying on trade of purveyor of milk—Sale of milk at railway station buffet—Necessity of registration - - 576
See MILK.

REGISTRAR—Company—Registration—Name of proposed company — Refusal of registrar to register—Mandamus - 23
See COMPANY. 1.

REGISTRATION—Company—Name of proposed company — Refusal of registrar to register—Mandamus - - - 23
See COMPANY. 1.

—— Milk—Carrying on trade of purveyor of milk—Sale of milk at railway station buffet—Necessity of registration - 576
See MILK.

—— Votes.
See PARLIAMENT.

REMITTED ACTION — Costs of proceedings under Order XIV.—Discretion of judge
See COUNTY COURT. 174

REMOTENESS—Damage—Savage animal—Liability of owner - - - 198
See NEGLIGENCE.

REPAIR—Bridge—Prerogative writ—Enforcement of duty to repair bridge—Vagueness of duty—Return to writ - 623
See MANDAMUS.

—— Waterworks—Breaking up street—Laying water pipe therein—Subsequent subsidence of street—Cost of repair - 493
See WATER. 2.

REVENUE—*Income Tax—Lands, Tenements, or Hereditaments—Waterworks—Annual Value—Profits—Rural District Council—Supply of Water to Contributory Places—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched.* (A.), *No. III.* ; *s.* 100, *Sched.* (*D.*) ; *s.* 101—*Revenue Act*, 1866 (29 & 30 *Vict. c.* 36), *s.* 8.
A rural district council under the powers conferred by the Public Health Act, 1875, supplied water to a number of contributory places. To some of these places the water was supplied at a profit, and to others at a loss to the council. In assessing the council under No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, in respect of the annual value or profits of waterworks, the surveyor of taxes took into account only those dealings which shewed a profit, on the ground that the undertaking of supplying

REVENUE *-continued.*
water was in respect of each contributory place a separate undertaking or concern :—
Held, on the facts, reversing the decision of Hamilton J. [1912] 2 K. B. 265, that the undertaking of supplying water was in respect of each contributory place a separate concern, and that the council must pay the tax in respect of each contributory place which made a profit.
By s. 8 of the Revenue Act, 1866, the concerns described in No. III. of Sched. (A.) of the Income Tax Act, 1842, are to be charged and assessed in the manner in the said No. III. mentioned according to the rules prescribed by Sched. (D.) of the same Act of 1842 so far as such rules are not inconsistent with No. III. of Sched. (A.) :—
Held, that this enactment does not constitute persons engaged in the concerns described in No. III. of Sched. (A.) "persons carrying on concerns in the nature of trade the profits whereof are made chargeable under the rules of Sched. (D.)" within the meaning of s. 101 of the Act of 1842 so as to entitle them under that section to set against the profits acquired in one or more of those concerns the excess of the loss sustained in any of the other concerns over and above the profits thereof. WAKEFIELD RURAL DISTRICT COUNCIL *v.* HALL - - C. A. 328

2. —— *Retailer's On-Licence—Duty—Annual Licence Value—Annual Value—Basis of Calculation—Tied House—Brewers' Profits—Deduction—"Increased Value" from Sale of Non-Intoxicants—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 44, *sub-s.* 2—*Revenue Act*, 1911 (1 *Geo.* 5, *c.* 2), *s.* 8.
By s. 43 of the Finance (1909-10) Act, 1910, there shall be charged and paid on the licences for the sale of intoxicating liquor specified in the First Schedule to the Act the duties of excise specified in that schedule. In cases within clause 3 of the "Provisions applicable to Retailers' On-Licences" in the First Schedule the duty is an amount equal to one-third of the annual licence value as certified for the purposes of the Act.
By s. 44, sub-s. 2, the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed exceeds the annual value which the premises would bear if they were not licensed premises, those values being calculated on the same basis as that on which the amount to be paid as compensation under s. 2 of the Licensing Act, 1904, is calculated in default of agreement.
By s. 8, sub-s. 1, of the Revenue Act, 1911, the annual value of any premises for the purpose of the duty on any excise licence charged by reference to annual value shall be, in England, the inhabited house duty value if there is such a value applicable :—
Held by the Court of Appeal, affirming the decision of Hamilton J., that in calculating the annual licence value of premises for the purposes of s. 44, sub-s. 2, the inhabited house duty value cannot be taken to be the annual value of the premises as licensed premises. The said annual value must be ascertained in accordance with the principles laid down in *Ashby's Cobham Brewery Co.'s Case* [1906] 2 K. B. 754 ; and, therefore, in the case of a tied house, the annua.

REVENUE—*continued.*
value includes such a sum as the brewers would be willing to pay in order to obtain the profits to be derived in one year from the supply of their beer to the tenant for sale on the premises.

By the last paragraph of sub-s. 2 of s. 44 it is provided that in estimating (for the purpose of the annual licence value) the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration :—

Held by the Court of Appeal, affirming the decision of Hamilton J., that this provision is not confined to hotels and premises ejusdem generis, but applies to all licensed premises substantially used for purposes other than the sale of intoxicating liquor.

Held, also, by the Court of Appeal (Kennedy L.J. dissenting), reversing the decision of Hamilton J., that the words "increased value" mean the whole value arising from the net profits obtained otherwise than from the sale of intoxicants, and not only such value arising from the extra profit, over and above the profit ordinarily made in the same business on unlicensed premises, as results from carrying on that business on licensed premises. TRUMAN, HANBURY, BUXTON & CO. *v.* INLAND REVENUE COMMISSIONERS - - - - - **C. A. 377**

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SHIPPING—*Charterparty—Lump Sum Freight—Loss of Ship by excepted Peril—Delivery of Part of Cargo—Right of Shipowner to Freight.*

The plaintiffs chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum as freight. The freight was payable on right delivery of the cargo. The charterparty contained the usual exception of perils of the seas. The ship arrived with her cargo on board outside the port of discharge, when owing to heavy weather she was driven ashore and became a total loss. Part of the cargo was washed ashore and was afterwards collected on the beach by the directions of the master and deposited on the dock premises, the residue being lost by the perils of the seas. In an action to recover payment of the lump sum freight :—

Held, that the shipowners, having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract and earned their freight, notwithstanding that the ship had not completed her voyage and that the portion of the cargo delivered had been so delivered otherwise than by the ship stipulated for. HARROWING STEAMSHIP COMPANY *v.* THOMAS - **Pickford J. 321**

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TRADE UNION — *Action for Tort against—Maintainability of Action—Trade Disputes Act*, 1906 (6 *Edw. 7, c. 47*), *s. 4, sub-s. 1.*

Sect. 4, sub-s. 1, of the Trade Disputes Act, 1906, which provides that "an action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court," is general in its application and is not limited to tortious acts committed in contemplation or in furtherance of a trade dispute; an action for libel or conspiracy to libel relating to matters affecting the trade union and its members as such will not therefore lie against a trade union: *per* Vaughan Williams L.J. and Kennedy L.J. (Farwell L.J. dissenting).

Where it appears that an action against a trade union comes within the prohibition contained in s. 4, sub-s. 1, of the Trade Disputes Act, 1906, the Court or a judge may, upon an interlocutory application under Order XXV., r. 4, order the name of the trade union to be struck out of the writ and subsequent proceedings on the ground that they disclose no reasonable cause of action against the union: *per* Vaughan Williams L.J. and Kennedy L.J. VACHER & SONS, LIMITED *v.* LONDON SOCIETY OF COMPOSITORS - - - - - - C. A. 547

2. —— *Agreement embodying Substance of Rules—Agreement concerning Conditions of Employment—Agreement for Application of Funds to provide Benefit—Trade Union Act*, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4.

By s. 4 of the Trade Union Act, 1871, it is enacted that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing (3.) any agreement for the application of the funds of a trade union to provide benefits to members.

The defendant was a member of a friendly society registered under the Trade Union Acts, 1871 and 1876. By one of the rules of the society a member meeting with an accident and becoming totally incapacitated from following his employment for the remainder of his life was entitled to receive the sum of 100*l.*; and all members receiving such a benefit were obliged to sign an agreement that in the event of their returning to their trade they would refund to the society the amount of accident benefit received. If a member failed to refund, certain officers of the society were empowered to institute legal proceedings for the recovery of the amount received.

The defendant, having met with an accident and being apparently incapacitated for life from following his employment of a moulder in an iron foundry, made a claim and received from the society a sum of 100*l.* On receipt of that sum he signed an agreement that in case he should at any time thereafter resume work as an ironfounder he would forthwith repay to the society the sum of 100*l.*, and that, in case that sum was not repaid within a named period, certain officers of the society should have power to sue and proceed against him in any Court of competent jurisdiction for the said sum.

The defendant was able to resume work as an ironfounder within the meaning of the agreement. In an action by the officers of the society against the defendant to recover the sum of 100*l.* under the agreement:—

Held by Vaughan Williams L.J. and Buckley L.J. (Kennedy L.J. dissenting), that the action was brought directly to enforce an agreement for the application of the funds of the trade union to provide a benefit to a member within the meaning of s. 4 of the Trade Union Act, 1871, and was therefore not maintainable.

Decision of Divisional Court (Phillimore and Bankes J.J.) [1911] 2 K. B. 132, reversed. BAKER *v.* INGALL - - - - C. A. 106

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WATER — *Supply — Charges — Dwelling-house outside a Borough but within the Limits of Special Act—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 1, 35, 53—*Plymouth Corporation Water and Markets Act*, 1867 (30 & 31 *Vict. c. exxciii.*), *ss.* 2, 14, 15, 22.

A special Water Act relating to the borough of Plymouth enacted by s. 14 that the corporation should provide water to the inhabitants within the borough, and by s. 15 that if the corporation thought fit they might supply water to persons within the water limits beyond the borough upon agreed terms, and by s. 22 that at the request of, amongst others, "any person who under this Act is entitled to demand a supply of water," the corporation should supply water at certain specified rates.

By s. 35 of the Waterworks Clauses Act, 1847 (which was incorporated with the special Act except where expressly excepted or varied by that Act), the undertakers shall provide a supply of water sufficient for all the inhabitants of the district within the limits of the special Act, and by s. 53 the occupier of a dwelling-house within those limits shall be "entitled to demand and receive from the undertakers" a supply of water upon paying the rate payable according to the provisions of that Act and the special Act.

The plaintiff was the occupier of a dwelling-house situated within the water limits of the special Act but outside the boundary of the borough of Plymouth:—

Held, that the effect of the two Acts when read together was that s. 22 of the special Act did not apply to the plaintiff, and that he was only entitled to be supplied with water upon agreed terms under s. 15 of the special Act.

Per C. PLYMOUTH CORPORATION - Div. Ct. 301

2. —— *Waterworks—Breaking up Streets—Laying Water Pipe (Incidental Powers)—Subsidence of Street—Cost of Repair—"Compensation for any Damage"—"Recovery of damages not specially provided for"—Jurisdiction of Justices*

WATER—*continued.*

—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 85.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may open and break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." By s. 85, "with respect to the recovery of damages not specially provided for" the Railways Clauses Consolidation Act, 1845, is incorporated with the Act and the special Act, and by s. 140 of the Railways Clauses Consolidation Act, 1845, the amount of such damages shall, in case of dispute, be ascertained and determined by two justices.

Undertakers for the supply of water to a borough under a special Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under their statutory powers opened and broke up the soil of a public road, which was within the district of and repairable by the county council, and laid a water pipe therein, and the road was then filled in and restored to its proper condition. The whole of the work was carried out in a proper, efficient, and workmanlike manner under the superintendence of the surveyor to the county council. Eight months after the completion of the work a portion of the road and a bank supporting it slipped, and the county council repaired the damage at a cost of 87*l.* The damage was the result of laying the water pipe in the road. The county council preferred a complaint before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage:—

Held, that the claim was not properly made under s. 28 of the Waterworks Clauses Act, 1847, it not being a claim for compensation for damage done in the execution of the undertakers' powers; that the compensation claimed was not "damages the recovery of which is not specially provided for" within the meaning of s. 85; and that therefore two justices had no jurisdiction under s. 140 of the Railways Clauses Consolidation Act, 1845, to ascertain and determine the amount of such damages.

Decision of a Divisional Court [1912] 2 K. B. 16, reversed. SWANSEA CORPORATION *v.* HARPUR - - - - - - - C. A. 493

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